SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968.

No. 1235

REESE HUBBARD AND LAS VEGAS HACIENDA, INC.,
Petitioners,

vs.

DONNA M. KIEFEL,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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DONNA M. KIEFEL,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Petitioners, Reese Hubbard and Las Vegas Hacienda, Inc., pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in case 15933, 15976 and 16210. (Consolidated)*

CITATIONS TO OPINIONS BELOW.

The memorandum opinion of the District Court (A. 35-41) is reported in 39 F. R. D. 592-596 and is printed in Appendix B, *infra,* pp. A. 10-17. The opinion of the United States Court of Appeals for the Seventh Circuit (R. 1-8)

*Petitioner, Reese Hubbard, was the trial attorney for petitioner, Las Vegas Hacienda, Inc., defendant in a personal injury action.

Pursuant to Rule 23 (5) the separate but related contentions of the two petitioners are combined in a single petition for the convenience of the Court.

printed in Appendix B, hereto, *infra*, pp. A. 18-34, is reported in 404 F. 2d 1163-1172.

JURISDICTION.

The judgment of the Court of Appeals was entered on November 15, 1968. (R. 9) Rehearing timely sought was denied on January 6, 1969. (R. 13) The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254(1).

QUESTIONS PRESENTED

(As to Trial Lawyer, Reese Hubbard.)

1. Will not the independence of the bar be irreparably injured if, as here, months after a civil trial, a trial lawyer may be punished summarily "for objectionable trial strategy" by the trial judge through an award of "costs," including attorney's fees, which was entered against the attorney

   (a) without giving him any advance notice of the charges to be defended,

   (b) without permitting him any opportunity to confront and cross-examine his accusers,

   (c) without allowing him any opportunity to present evidence corroborative of his factual statements made during trial, and

   (d) without making specific findings of fact and conclusions of law which would determine the issues on appeal?

2. May the strict limitations of constitutional due process, of the direct contempt statute, and of the summary contempt rule all be cavalierly swept aside, simply by changing the name of the proceeding from "contempt" to "costs," and by making the resulting award to opposing

counsel, rather than to the government as a "fine"? 18 U. S. C. § 401; F. R. Cr. Proc. 42(a).

3. Was 28 U. S. C., § 1927 (*infra,* p. A. 8) enacted to enable a federal court to ignore the foregoing limits on its power to punish a trial lawyer?

4. In the exercise of this Court's supervisory power over lower federal courts to permit the "effective administration" of justice, should not this Court review this extraordinary expansion of power over the trial lawyer's representation of his client?

5. Have the members of this Court and the commentators been wrong in thinking that "an independent judiciary and *a vigorous independent bar* are *both* indispensable parts of our system of justice," *Re McConnell,* 370 U. S. 230, 236, 82 S. Ct. 1288, 8 L. Ed. 2d 434 (1962), and that "... the legal process conducted by *independent judges* will be incapable of resisting ... tyranny unless the judges are aided *in the course of trials* ... by *equally independent lawyers* ..."? Rostow, The Lawyer and His Client, 48 A. B. A. J. 25, 28 (1962).

6. May a district judge and a Court of Appeals ignore a century of precedent and tradition that power to punish a lawyer must derive from statute or rule? See *Nye* v. *United States,* 313 U. S. 33, 47, 85 L. Ed. 1180 (1941).

Is that century of legal tradition, born of the impeachment of Judge Peck and the enactment of the predecessor of the present contempt statute, suddenly to be ended, by the opinion below?

7. Did not both courts below err in receiving statements from opinions in other cases, to which Reese Hubbard was not a party, as conclusive evidence of "objectionable trial strategy" in this case?

8. Is the conclusion of "objectionable trial strategy" in this case sustained by evidence?

9. Does "costs" include expert witnes fees?

10. After reducing a "costs" judgment against a trial lawyer from $8,171.56 to $1,741.20, by eliminating the trial court's award of attorney's fees, may the Court of Appeals further punish the trial lawyer for "objectionable trial strategy," or for appealing the "costs" judgment, by awarding opposing counsel their fees on appeal?

11. Was it not error for the Court of Appeals to sustain the "costs" judgment punishing a trial lawyer (not an ordinary civil judgment) by utilizing charges made against the lawyer on the second trial of the injury action, which took place long after the "costs" judgment had been entered and appealed from? Is this not the same type of change of theory at the review level which was held to be a "denial of due process," in *Gregory* v. *City of Chicago*, 37 U. S. Law Week 4213 (March 19, 1969)?

12. Was the lawyer's request for a trial by jury improperly refused?

13. Was the lawyer's request for trial by a different judge improperly refused?

QUESTIONS PRESENTED.

(As to the defendant-client, Las Vegas Hacienda, Inc.)

1. Was not the use, by both Courts below, of matter dehors the record, from opinions involving earlier clients of Reese Hubbard, who are not in privity with this defendant, both improper and highly prejudicial?

2. Ought all the clients of a lawyer, over his entire career, to be regarded as in privity with each other?

3. May a District Court and a Court of Appeals overrule the time-honored tradition, sanctioned by this Court, that judgments bind only the parties thereto and persons in privity with them? *e.g.*, *Hansberry* v. *Lee*, 311 U. S. 32, 40-41, 85 L. Ed. 22, 26, 61 S. Ct. 115, 132 A. L. R. 741.

4. Does not the receipt of the statements from other cases show that defendant fell the victim of an attitude of judicial hostility toward its lawyer, which had its origins outside this lawsuit?

5. Is not that attitude most forcefully shown by the following statement of the trial court, which is quoted by the Court of Appeals as an adequate basis for Judge Robson to give plaintiff a new trial? (See pp. A. 16-17, 21, *infra.*)

> "The court is convinced that because of the unprofessional tactics of Reese Hubbard, counsel for defendant, the plaintiff did not have a fair trial. Counsel for defendant is a lawyer who has had long and extensive trial experience. These years in the court should have taught him compassion and a sense of fair play. Instead, he seeks to use his experience to assert and apply every sly trick and strategem to win his case. He does this with the hope that he can stay within the bounds of professional ethics. In this instance, he has far overstepped the bounds. This court finds that his trial tactics were such that the jury might or could have been influenced by his unfair actions and as a result found for the defendant."

6. Does not the record disclose that the courts below were so influenced by past criticisms of defendant's lawyer that defendant did not receive a fair trial or appeal?

(First Trial.)

7. Was not the grant of a new trial a denial of Hacienda's rights under the Seventh Amendment to a trial by jury? Will not that Amendment barring reexamination of facts found by a jury, be reduced to a nullity, if as here, a court may grant a new trial simply because it dislikes either the verdict, or the lawyer?

8. If an opening statement has not been objected to by the court or opposing counsel at the time, may that opening

statement later be made the basis for an award of a new trial?

9. Is failure to present evidence described in the opening statement error, if it results from the court's action in improperly sustaining objections by opposing counsel to that class of evidence?

10. If plaintiff's counsel wished to bar Hubbard in his opening statement from mentioning a witness's [Tracy's] evidence, ought he not to have moved for a protective order since her name was on the pretrial list and he had recently taken her statement? Failing that, ought he not to have objected promptly to the opening statement rather than allow the case to be tried for two weeks?

11. In holding there was a duty to file the uncertified deposition of Sharon Hamlin, rather than return it to the court reporter for certification, have not the courts below completely misread F. R. C. P. 30?

12. May a lawyer, after verdict, claim prejudice because of his inability to bring in as a witness a court reporter from across the country on only one day's notice, when he did not request any delay to accommodate the witness?

(Second Trial.)

13. Did not the trial court make prejudicially erroneous rulings of law respecting the witnesses Tracy and Carpenter? Was not their testimony admissible under well-established exceptions to the hearsay rule?

14. May a District Court and a Court of Appeals ignore the law of evidence as it has been stated by this Court and the courts of the State of Illinois? *Mutual Life Ins. Co.* v. *Hillmon,* 145 U. S. 285, 36 L. Ed. 706, 12 S. Ct. 909; *Keshner* v. *Keshner,* 376 Ill. 354, 55 N. E. 2d 877; VI Wigmore on Evidence, 3rd Ed. (1940) §§ 1725, 1729, 1730, pp. 79-85, 91, 93-94.

If so, are not Rule 43 (F. R. C. P.) and the *Erie* doctrine nullified? Are such rules to be termed merely matters of "tactical interplay"? (A. 34, *infra.*)

15. Is not the failure of the Court of Appeals even to mention defendant's most important contentions of legal error in the second trial further indication that defendant Hacienda was denied its day in court because of the Court's felt "outrage" at what it called the "history of Hubbard's practice"? (Opinion, *infra,* p. A. 30)

STATUTES, RULES, AND CONSTITUTIONAL PROVISIONS INVOLVED.

The following statutory provisions, reprinted in Appendix A, *infra,* pp. 5-8 are involved: 18 U. S. C., § 401 (*infra,* pp. A. 5-6); 28 U. S. C., § 1912 (*infra,* p. A. 6); 28 U. S. C., § 1913 (*infra,* p. A. 6); 28 U. S. C., § 1920 (*infra,* pp. A. 6-7); 28 U. S. C., § 1923 (*infra,* p. A. 7); 28 U. S. C., § 1927 (*infra,* p. A. 8).

Amendments VI, VII (*infra,* pp. A. 8-9) and Amendment V (*infra,* p. A. 9) to the United States Constitution are involved.

Rules 30 (*infra,* pp. A. 1-2), 43 (*infra,* p. A. 2); 52 (*infra,* p. A. 3); 61 (*infra,* pp. A. 3-4) of the Federal Rules of Civil Procedure are involved. Rule 42 (*infra,* p. A. 4) of the Federal Rules of Criminal Procedure is involved. Rule 39 (c, e) of the Federal Rules of Appellate Procedure (*infra,* p. A. 5) is involved.

STATEMENT OF THE CASE.

Donna M. Kiefel was assaulted in her motel room at the Las Vegas Hacienda and sustained personal injuries. She sued the Hacienda for $1,000,000 (A. 3-5).* Her husband

*A.—refers to Appendix in 15933, 15976 [labelled I on cover]; A. II—refers to Appendix in No. 16210 [labelled II]; Add. App.

Carl Kiefel sued for $250,000, claiming loss of consortium (A. 6). The district court had jurisdiction by reason of the diversity of citizenship of the parties.

There were two jury trials in the case. At the beginning of the first trial the husband's claim was withdrawn (A. 18). The jury returned a verdict for defendant Hacienda.

The district court ordered a new trial. Six months later, on motion of plaintiff, the court assessed against the Hacienda and its trial lawyer, Reese Hubbard, "costs" in the amount of $8,171.56, for the benefit of plaintiff's attorneys (A. 139-142). Separate appeals were taken by the Hacienda and Reese Hubbard from the order awarding "costs."

While the appeals were pending the injury case was retried before a different judge and jury. The second jury returned a verdict for Mrs. Kiefel in the amount of $100,000, and the Hacienda appealed. (A. II 19)

The appeals were consolidated. The Court of Appeals reversed the "costs" judgment against the Hacienda, reversed it in part ($6,430.36) and affirmed it in part ($1,741.20) against Reese Hubbard, the lawyer, and affirmed the order granting a new trial and the judgment for $100,000 entered on the verdict in the second trial. (*Infra*, pp. A. 31-32)

The Court of Appeals also remanded the case to the district court "for assessment of costs against Reese Hubbard for the expenses of printing plaintiff-appellee's 54-page brief and the additional appendix in No. 15976 and a sum no greater than one-third (1/3) the plaintiff-appellee's attorneys' fee incurred in the appeal of cases Nos. 15933, 15976 and 16210." (*Infra*, p. A. 32)

—refers to [blue] Appendix filed by plaintiff; Rep. App.—to the Reply Appendix.

There are two certifications of record from the Court of Appeals, Vol. I containing pages R. 1-R. 14, and Vol. II containing pages R. 15-R. 32.

The first trial judge described the three critical questions in the injury case as follows (A. 35-36) (*Infra*, p. A. 11):

(1) Who inflicted the injuries, her husband or an intruder?

(2) If an intruder, did he gain entrance through plaintiff's contributory negligence by virtue of an unlatched door, or plaintiff's negligence due to intoxication, or other circumstance?

(3) Did the assault proximately result from defendant's negligence in failing to provide an adequate lock on the door or in not maintaining sufficient security guard in the corridor? (A. 35-36)

In the same memorandum, the trial court said that it was allowing plaintiff's motion for a new trial because it felt, "the jury might or could have been influenced" by "objectionable trial strategy" of Hubbard in the following three particulars (A. 35, 36, 38-41) (*Infra*, pp. A. 11, 14, 15-17):

(1) Insinuating in his opening statement and in cross-examination of Carl Kiefel that the plaintiff and her husband had an altercation, which defendant would prove by the husband's statement to the telephone operator, Dixie Tracy, and then failing to make the promised proof.

(2) Failure to file the uncertified deposition of Sharon Hamlin.

(3) Precluding the court appearance at the Chicago trial of Stella Butterfield, the Las Vegas court reporter, who took the Hamlin deposition.

1. What the Record Shows on Charge 1.

Sometime before 5:20 a.m., March 1, 1962, someone entered plaintiff's room and attempted to murder her by striking her on the head with a bottle of champagne, fracturing her skull. (A. 290-292) The bottle of champagne

was one of four which plaintiff and her husband had sitting on a table. (A. 600; A. II 809)

During the evening and morning of February 28-March 1, 1962 the Kiefels went to shows, after which they returned to the Hacienda and had a drink at the bar. (A. 271) Plaintiff then returned to their room and went to bed. (A. 274) Plaintiff testified that Carl Kiefel decided to stay in the gambling casino. (A. II 220) (At the first trial, Carl Kiefel gave uncorroborated testimony that he played blackjack in the casino until 6:30 a.m. A. 218)

Plaintiff's husband, Carl Kiefel, made several extremely damaging admissions to a maid and telephone operator during the early morning hours of March 1, 1962. To the maid, Willie Lee Carpenter, who admitted him to the room about 7:00 a.m., with her latchkey, he explained that he gave the key to his wife when she returned to the room earlier, that he had then told her to leave the door unlocked, but that when he came back the door was locked. (A. 560; A. II 604)

[Note: while a patient at Sunrise Hospital, plaintiff Donna Kiefel admitted on numerous occasions to various persons, including nurse Sharon Hamlin, that she had left the door unlocked, pursuant to this arrangement with her husband. (A. 601-602; A. II 811; A. 494; A. II 806-807; A. 539, A. II 635, 794, 827; A. 599; A. II 808-809)]

During the hours between 2:00 and 6:15 a.m., Carl Kiefel attempted to make fourteen telephone calls to his room. (A. 86-87) Tracy, the phone operator, asked him why he did not get a key from the desk. He answered: "The chain is on. My wife and I had some words and she put the chain on and I can't get in." (A. 86-87)

Plaintiff's counsel had been advised of the maid's [Carpenter] evidence and the phone operator's [Tracy] evidence in advance of trial. The maid's name was on the pretrial order. Plaintiff's counsel had a copy of her state-

ment. (A. 11) By leave of court the name of Tracy was added to the pretrial memorandum, it being completely understood that plaintiff's counsel would interview the phone operator on his already planned visit to Las Vegas. (A. 12) Ten days before trial plaintiff's counsel took a sworn statement from the telephone operator, which described the calls and Kiefel's admission of the altercation with his wife. (A. 42)

On November 2, 1965, the day of the start of the first trial, Carl Kiefel was dismissed as a party to the lawsuit. (A. 18-23) However, the pretrial order was not amended to delete Tracy and Carpenter as witnesses. Nor was an order sought barring any mention of the admissions in Hubbard's opening statement.

Hubbard thereupon told the jury in his opening statement that "the evidence would show that *the husband told the telephone operator that he and his wife had had a fight and that she wouldn't let him in the room.*" (A. 38-39) (Emphasis by the Court.)

Plaintiff's counsel apparently did not make any objection to the opening statement. Hubbard transported both Carpenter, the maid, and Tracy, the telephone operator, all the way from Las Vegas to testify. (A. 556-561; A. II 609)

Hubbard could not present Tracy's evidence of the husband's declaration, because the trial court had ruled, during Carpenter's testimony, that anything Carl Kiefel had said outside his wife's presence would not be admitted.

> "The Court: To anything that he said the objection is sustained." (A. 558-559)

Further, when Hubbard attempted to question Carl Kiefel about his statement to Tracy that there had been a fight, and that plaintiff had chained him out of the room, the trial court sustained plaintiff's objection. (A. 45)

Though Carl Kiefel had been dismissed as a party, Hubbard believed that Kiefel's declarations were still admis-

sible, under three well-recognized exceptions to the hearsay rule:

A. They showed his state of mind at the critical time. See *Mutual Life Ins. Co.* v. *Hillmon,* 145 U. S. 285, 12 S. Ct. 909, 36 L. Ed. 706 (1892); *U. S.* v. *Annunziato* (C. A. 2 1961), 293 F. 2d 373, 376-378; *Keshner* v. *Keshner,* 376 Ill. 354, 55 N. E. 2d 877 (1941); VI Wigmore on Evidence, 3rd Ed. (1940) §§ 1725, 1729, 1730, pp. 79-85, 91, 93-94.

B. Kiefel's declarations were admissible as explanatory of other independently admissible evidence. When Security Officer Prolle entered the room, he told Kiefel not to touch anything, lest he destroy the fingerprints thereon. (A. 603, 613) Immediately, Kiefel grabbed the assault weapon, thereby destroying any fingerprints. (A. II 98) Further, there was evidence that he rendered no assistance to his critically-injured wife, and that he failed to accompany her to the hospital. (A. 45, 301)

Kiefel's declaration to the operator would be explanatory of his reasons for the foregoing conduct. See *U. S.* v. *Annunziato* (1961), 2 Cir., 293 F. 2d 373; *Fitzgerald* v. *Benner,* 219 Ill. 485, 494, 76 N. E. 709 (1906); *Yarborough* v. *Prud. Ins. Co.* (1938), 5 Cir., 99 F. 2d 874, 100 F. 2d 547.

C. Kiefel contracted for the trip and the room for himself and plaintiff. They occupied it jointly. She sued for nonperformance of the contract. Hence, his admissions were admissible against her.

See *Forsyth* v. *Doolittle,* 120 U. S. 73, 74, 30 L. Ed. (1877); *Miller* v. *Mathias,* 145 Ill. App. 465, 466 (1908); *Hayes* v. *Claessens,* 234 N. Y. 230, 137 N. E. 313 (1922); *Ken* v. *Clements,* 148 Pa. Super. 378, 25 A. 2d 734 (1942); *Toler* v. *Bishop,* 84 Ill. App. 278, 280.

All other matters in the opening statement were proved. (A. 257, 539, 561; A. II 241-243, 271-273) Plaintiff herself admitted that "the light from the bathroom shone on his [the attacker's] face." (A. 192)

2. What the Record Shows on Charge 2.

One of the five persons to whom plaintiff admitted she left the door unlocked was student nurse Sharon Harvey Hamlin, who recorded in the hospital notes (A. 539; A. II 635, 794, 827):

> "Patient has remembered how she came to Las Vegas, with whom she came, where she stayed, and she also remembers going to her room the night she was attacked, leaving the door unlocked so that her husband could come in."

By the time of trial Sharon had married, had a baby, and was uncertain as to whether she could come to Chicago to testify. (A. 513-514; A. II 65-66) Hence, her deposition was taken October 22, 1965 in Las Vegas, Nevada, at the office of Singleton, Delanoy & Jemison by Frank Hall, a Chicago lawyer associated with Reese Hubbard. (A. II 30) The reporter was Stella Butterfield. (A. II 30)

Late in October, prior to trial, Mrs. Hamlin signed it in Mrs. Butterfield's presence. Mrs. Butterfield did not certify it, as she had forgotten her seal. (A. 782) She left it with Hamlin. (A. 782)

Hamlin brought it with her uncertified to Chicago on November 4, 1965, two days after the trial started (A. 528, 538), and left it at Reese Hubbard's office. (A. 538)

She then went to her family home in Baltimore, Maryland. (A. 528-529) Twelve days later, on November 16, 1965, she testified in this case. (A. 510-513)

While she was gone, Hubbard had the deposition returned to Las Vegas for certification. (A. 539-540; 541-542)

Reese Hubbard's statements to the court about the whereabouts of the deposition were corroborated by the testimony of Hamlin, as well as by the factual assumption of the plaintiff's counsel's questioning at the second trial. (A. II 552)

Moreover, Hubbard had no duty or right under Rule 30(e, f) to file the uncertified deposition. Indeed, the rules do not contemplate that anyone but the reporter shall have or file the original of the deposition.

It was never clear that Mrs. Hamlin could stay away from Las Vegas long enough to testify. Her child was ill. (A. 539-54) She was away nearly two weeks waiting to testify. (A. 539-540) Rule 30(f), F. R. C. P., required that the deposition be certified and filed by the reporter (Butterfield) if it were to be used by Hubbard.

3. What the Record Shows on Charge 3.

Hamlin finally testified on November 16, 1965, at about the end of the first trial. Jacobson, plaintiff's counsel, thereafter sought to bring Butterfield, the Las Vegas reporter, to Chicago so that she could testify on November 17, 1965 to impeach Hamlin.

The criticism of the trial court that Hubbard "hamstrung the plaintiff's counsel in precluding the appearance of an out-of-town court reporter [Butterfield] to testify," and that he "manipulated matters so that . . . [she] would not be available to appear at this trial . . ." rests solely on an affidavit of plaintiff's counsel, which was contradicted by Butterfield herself.

Jacobson's affidavit, contained in the post trial motion, asserted that he [plaintiff's counsel] had called Butterfield on November 16, 1965 and that she had agreed to come to Chicago the next day (A. 27, 28). At 9:30 p.m., the motion continued, Butterfield called Jacobson, told him she had purchased her ticket, but that William Singleton refused to release her from a deposition commitment. (A. 27-28) At 10:30 p.m., the motion continues, Jacobson made a long distance call to Singleton at his home, asking rescheduling of the deposition, and that Singleton flatly refused." (A. 28.)

Hubbard categorically denied having anything to do with any of the foregoing events. (A. 91)

Hubbard's demand to cross-examine Jacobson and to present evidence corroboration of his denial was refused. (A. 139, 623-632)

Neither Singleton nor Butterfield testified. Butterfield, however, did give a deposition, before retrial of the injury case, in which she denied that Jacobson spoke to her personally (only his "office girl"), denied she had ever purchased a ticket (only checked availability of flights), and denied she had ever agreed to come to Chicago to testify. (A. 665)

All she agreed was to find a substitute reporter for the Singleton deposition. (A. 665) Unable to find another reporter in Las Vegas to take her next day's work, she asked the office of Singleton, Delanoy & Jemison to reschedule the November 17 deposition, and was told "it was a very important case." (A. 665)

It is uncontradicted that Jacobson never contacted Hubbard to ask him to intervene with Singleton. (A. 589)

Nor did plaintiff's counsel move to obtain Butterfield's appearance on November 18, when it became apparent she could not make it on November 17. Under Illinois law such an attempt and motion is an absolute prerequisite to the grant of a new trial because of the absence of a witness. *Pinkstaff* v. *The Pennsylvania R. Co.*, 23 Ill. App. 2d 507, 507-24, 163 N. E. 2d 728 (1959), *affirmed* 20 Ill. 2d 193, 170 N. E. 2d 139 (1961), *cert. den.* 365 U. S. 878, 81 S. Ct. 1029 (1961); *Kendall* v. *Limberg*, 69 Ill. 355, *Clark* v. *Chicago Rys. Co.*, 192 Ill. App. 358, 360 (1915); *Casey* v. *Sawyer Biscuit Co.*, 163 Ill. App. 145 (1911); *Mastin* v. *National Tea Co.*, 278 Ill. App. 60 (1934); *Nehring* v. *Ricker*, 126 Ill. App. 262 (1906).

REASONS FOR GRANTING THE WRIT.

(AS TO HUBBARD, THE LAWYER).

1. Review should be granted because this entire proceeding to punish Hubbard summarily nullifies the statute especially enacted to protect the independence of the bar, 18 U. S. C. § 401, and Rule 42, F. R. Cr. P. (*Infra*, pp. A. 4, A. 5-A. 6)

18 U. S. C. § 401 (the current citation) was enacted, following the impeachment trial of Judge Peck, to restrict the contempt power of courts, so that it would not be used to discipline lawyers. We believe Congress intended to prevent the very thing done in this case.

Plaintiff made certain charges in a motion for a new trial. (A. 26) Hubbard denied these charges. (A. 84) The court refused Hubbard the right to meet and disprove these charges. (A. 623-624) Hubbard made timely demand for a jury trial, and before a different judge. (A. 84, 138) It also was refused. (A. 139)

The reviewing courts, when cases involving lawyers have come to their attention, always mention the historical fact that this statute was passed especially to protect the independence of lawyers in the exercise of their profession. *Cammer* v. *United States*, 350 U. S. 399, 76 S. Ct. 456, 100 L. Ed. 474 (1956); *Re McConnell*, 370 U. S. 230, 82 S. Ct. 1288, 8 L. Ed. 2d 434 (1962), *reversing* 294 F. 2d 310 (C. A. 7, 1961); *DeParcq* v. *U. S. District Court for Southern Iowa*, 235 F. 2d 692 (8th Cir. 1956). The Courts emphasize the public policy reason for restricting the power of contempt by quoting the argument of Congressman Buchanan (350 U. S. 399, 406): *"The public have almost as deep an interest in the independence of the bar as of the bench."* (Emphasis supplied.)

18 U. S. C. § 401 defines the limits of the power of a United States Court to punish for contempt as follows:

> "A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—
>
> "(1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;
>
> "(2) Misbehavior of any of its officers in their official transactions;
>
> "(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command."

Referring to the statute quoted above, the third paragraph obviously does not apply in this case. See *United States* v. *De Parcq,* 164 F. 2d 124 (7th Cir., 1947).

The second paragraph also is inapplicable because the United States Supreme Court has held that a lawyer is not an officer of the court within the meaning of this statute. *Cammer* v. *United States,* 350 U. S. 399, 407-408, 76 S. Ct. 456, 100 L. Ed. 474 (1956).

Nor does Hubbard's conduct come within the scope of paragraph one. *Re McConnell,* 370 U. S. 230, 82 S. Ct. 1288, 8 L. Ed. 2d 434 (1962); *United States* v. *Sopher,* 347 F. 2d 415 (7th Cir., 1965). In *Re McConnell* the Supreme Court reversed the contempt conviction of a lawyer who had been fined $100 for persistent interrogation of witnesses on an issue after it had been (erroneously) ruled out of the case by the trial judge. The lawyer stated: "We have a right to ask the questions, and we propose to do so unless some bailiff stops us." This Court said: (370 U. S. 236)

> "The arguments of a lawyer in presenting his client's case strenuously and persistently cannot amount to a contempt of court so long as the lawyer does not in some way create an obstruction which

blocks the judge in the performance of his judicial duty. The petitioner created no such obstacle here.

"* * * *An independent judiciary and a vigorous, independent bar are both indispensable parts of our system of justice.* To preserve the kind of trials that our system envisages, Congress has limited the summary contempt power vested in courts to the *least possible power adequate to prevent actual obstruction of justice,* and we think that that power did not extend to this case." (Emphasis supplied.)

A reading of the Appendix shows that Hubbard's obedience to the court's rulings was exemplary. In no degree did he approach the behavior of the advocate in the *McConnell* case. In marked contrast to *McConnell,* above, p. 16, Hubbard refrained from calling Dixie Tracy, then available (A. 43), to make an offer of proof such as offended the trial judge in the *McConnell* case, 37[illegible] S. at 232. His deference to the court's ruling on this crucial evidence question was beyond criticism, as well as procedurally correct. Hubbard followed the example of the lawyer in *Bartholow* v. *Davies,* 276 Ill. 505, 514-515, 114 N. E. 1017 (1917), rather than the example of the lawyer in the *McConnell* case.

Nothing said or done by Hubbard would constitute conduct within the power of the court to punish him for contempt. The judgment under review is not a taxation of "costs" as that legal term is universally understood.

If a judgment of this type could be entered against a lawyer, it would be a far greater threat to the independence of the advocate than the penalties attempted to be imposed in the *Cammer* and the *McConnell* cases.

The rights of a court to enter judgment, without a trial, on the verity of its own observations is limited to matters within the contempt statute. It is an immutable principle of Constitutional due process that in all other matters the

court must hear evidence and must grant a jury trial with right of confrontation and cross-examination of witnesses. *Greene* v. *McElroy,* 360 U. S. 474, 79 S. Ct. 1400, 3 L. Ed. 2d 1377 (1959); *Willner* v. *Committee on Character & Fitness,* 373 U. S. 96, 83 S. Ct. 1175, 10 L. Ed. 2d 224 (1963); *Nye* v. *United States,* 313 U. S. 33, 61 S. Ct. 810, 85 L. Ed. 1172 (1941); *Holt* v. *Virginia,* 381 U. S. 131, 85 S. Ct. 1375, 14 L. Ed. 2d 290 (1965).

Even in contempt cases the power to initiate summary punishment is lost after trial, so that notice and an evidentiary hearing are required. F. R. C. P. 42(b). *Re Oliver,* 333 U. S. 257, 92 L. Ed. 682, 68 S. Ct. 499; *see Sacher* v. *United States,* 343 U. S. 1, 11, 96 L. Ed. 717, 724, 72 S. Ct. 451 (1952). Summary punishment for contempt, moreover, will not lie in any instance where, as here, "any elements of the offense are not personally observed by the judge, so that he must depend on statements made by others for his knowledge of these elements * * *." *Re Oliver,* 333 U. S. 257, 275, 92 L. Ed. 682, 695, 68 S. Ct. 499 (1948); *Cooke* v. *U. S.,* 267 U. S. 517, 69 L. Ed. 767, 45 S. Ct. 390 (1925).

In enacting and interpreting 18 U. S. C. § 401, Congress and the Supreme Court were not just protecting the narrow professional interests of lawyers, but they were defending our adversary system, which cannot exist without an independent bar. The universal agreement in our society that the courts can not function without free advocacy finds frequent expression in the speeches and writings of judges and law teachers. We conclude with one statement of the public interest in this regard:

> "It is our common conviction that the legal process, conducted by independent judges, will be incapable of resisting public or private tyranny unless the judges are aided in the course of trials, and in all other aspects of the work of the profession, *by equally independent*

lawyers, who have been schooled to provide a fearless and intransigent inquiry into every relevant circumstance of the problem being dealt with." (Emphasis supplied.) (Rostow, *The Lawyer and His Client,* 48 A. B. A. J. 25, 28 (1962).)

28 U. S. C., § 1927 (*infra,* p. A8) was not enacted to enable a federal court to curtail the independence of the bar by ignoring the limitations of 18 U. S. C., § 401, and F. R. Cr. p. 42 on its power to punish a trial lawyer.

2. Certiorari should be granted because this entire proceeding completely nullifies petitioner's constitutional rights, which may not be cavalierly swept aside by changing the name of the proceeding from "contempt" to "costs."

A. Confrontation and Cross-Examination.

In denying Reese Hubbard the right to confront and cross-examine his accusers, the opinion is in direct conflict with this Court's decisions in *Willner* v. *Committee on Character & Fitness,* 373 U. S. 96, 103, 105, 83 S. Ct. 1175, 10 L. Ed. 2d 224, 229, 231 (1963); *In re Oliver,* 333 U. S. 257, 259, 273, 275, 92 L. Ed. 682, 694, 695 (1948); *Greene* v. *McElroy,* 360 U. S. 474, 3 L. Ed. 2d 1377, 79 S. Ct. 1400 (1959). See also *Berger* v. *Calif.,* 37 U. S. Law Week 3247, 89 S. Ct. 540, 541 (1969); *Barber* v. *Page,* 390 U. S. 719, 721, 88 S. Ct. 1318, 1320, 20 L. Ed. 2d 255 (1969); *Pointer* v. *Texas,* 380 U. S. 400, 13 L. Ed. 2d 923, 85 S. Ct. 1065 (1965).

In denying Reese Hubbard's right to confront his accusers, the opinion is also in conflict with *Cohn* v. *Kramer,* 136 F. 2d 293, 295 (C. A. 6, 1943); *N. L. R. B.* v. *Whittier Mills,* 134 F. 2d 725, 728 (C. A. 5, 1941); *N. L. R. B.* v. *Rath Packing Co.,* 123 F. 2d 684, 685 (C. A. 5, 1941).

The most serious of the three charges against Reese Hubbard, relied on by Judge Robson, was that Reese Hub-

bard "precluded" an impeachment witness, named Stella Butterfield, from coming to Chicago from Las Vegas on one day's notice to testify. (A. 40-41) Hubbard categorically denied the charge. (A. 91)

No witness appeared and contradicted him. All that supports the Court's conclusion is the affidavit assertion of plaintiff's counsel, Lowell Jacobson, contained in the motion for new trial, that after witness Sharon Hamlin testified on November 16, 1965, Jacobson called reporter Stella Butterfield in Las Vegas to ask her to fly to Chicago the next day and bring her notes and impeach Hamlin, and that Butterfield agreed to this request. (A. 27) At 9:30 p.m., that evening, Jacobson continues, Butterfield called him back and told him she had purchased her ticket, had her hair done, and was ready to come to Chicago, but could not reschedule a deposition at the office of William Singleton, a local attorney. (A. 28) Jacobson says he then called Singleton to ask him to continue the deposition, and was refused. (A. 28)

(Singleton is not connected with the case other than (1) two depositions were taken in his office on October 22, 1965 and (2) Hacienda's insurer in this case is listed in Martindale-Hubbell among the clients of his firm. (A. 40, Rep. A. 10)

Hubbard properly requested the right to confront and cross-examine his accuser, Jacobson. (A. 85)

For the court to infer that Hubbard had caused Singleton to refuse to release Butterfield without permitting Jacobson's cross-examination, was, under the foregoing authorities, reversible error and an unconstitutional deprivation of rights.

The prejudicial character of this error is shown by the fact that when Butterfield was later deposed in the principal case, she denied she had ever agreed with Jacobson to come to Chicago the next day, or that she had purchased a

ticket. In fact, she denied she spoke with Jacobson at all. (A. 665)

When Jacobson's office girl called, Butterfield told her only that she would like to come if she could get a substitute reporter for Singleton's important deposition scheduled the next day. (A. 665) Unsuccessful in that, she asked Singleton's office to reschedule it and was reminded that "it was a very important case." (A. 665)

B. Right to An Evidentiary Hearing.

In denying Reese Hubbard's request for a full evidentiary hearing with advance notice of the charges to be made against him, and an opportunity to rebut them with evidence and with specific findings, the opinion is in direct conflict with *Holt* v. *Virginia*, 381 U. S. 131, 14 L. Ed. 2d 290, 85 S. Ct. 1375 (1965); *In re Oliver*, 333 U. S. 257, 273, 92 L. Ed. 682, 2694 (1948); *In re Raffalo*, 390 U. S. 544, 20 L. Ed. 2d 117 (1968); *In re Murchison*, 349 U. S. 133, 99 L. Ed. 942, 75 S. Ct. 623. See also *Brotherhood of Loc. Fire & Eng.* v. *Bangor & Aroostock R. Co.*, 380 F. 2d 570, 581 (D. C. Cir. 1967).

The cited cases indicate that the fact that a hearing was given on plaintiff's motion for a new trial is not enough to satisfy due process for a number of reasons. At that time no judgment was sought against Hubbard. Only months later did plaintiff first ask for judgment against Hubbard for attorney's fees and expenses. (A. 46) Hubbard then engaged counsel and asked for a trial. But Hubbard's liability was adjudged without a hearing. The only evidentiary hearing permitted was on the amount to be assessed against him. (A. 629)

Hubbard denied the charges against him, including the recitals in the court's opinion. (A. 623; 84, 85, 86-87, 91, 93-94) He asserted the right to see and to cross-examine

the witnesses against him. He demanded a trial by jury. (A. 84-85) He was denied the right to bring in evidence and disprove the statements made in the court's memorandum against him. (A. 624)

Reese Hubbard attached to his Answer affidavits and statements of 14 sitting judges, before whom he had tried a legion of jury cases. Each judge vouched unqualifiedly for his proper conduct in all cases tried before him. (A. 125-137)

The peculiar vice of the court's collateral acceptance of the record in the civil case and on the post trial hearing is shown forcefully in connection with the charge that Hubbard prevented the Nevada court reporter, Butterfield, from coming to Chicago to testify on one day's notice. (See pp. 14-15, 21, *supra*)

Reese Hubbard categorically denied the charge. No witnesses appeared at the post trial hearing to contradict him. Nor did Hubbard bring witnesses to the post trial hearing from Nevada to corroborate himself.

But, a lawyer's statement of fact is normally taken at face value in a civil proceeding against his client. When the trial court decided not to take Hubbard's statement and denial at face value, due process required a full evidentiary hearing. The Las Vegas attorney, William Singleton, would know whether Reese Hubbard contacted him on November 16, 1965 to refuse to release Butterfield from a November 17 deposition in his office. Reese Hubbard had the right to present Singleton's evidence on this issue.

Further, at such a hearing Butterfield's testimony that she had talked only to Jacobson's office girl, had agreed to come only if she could get a substitute reporter for the Singleton deposition, and had not purchased her ticket, could have been presented. (See pp. 15, 21, *supra*)

Similarly, on the first charge of "objectionable trial

strategy", namely, failure to prove Kiefel's statement to the telephone operator Tracy that he and his wife were fighting and that she had chained him out, Tracy could have testified that Hubbard had brought her all the way from Las Vegas to testify (A. II 609), as he said he would in his opening statement. This was the only matter from the opening statement which was not proved. But for the erroneous ruling sustaining plaintiff's improper objection "to anything that he plaintiff's husband said" (A. 558-559), Tracy would have testified.

Under the foregoing authorities, Hubbard was entitled to an evidentiary hearing on the court's charges, after advance, specific notice. In *Re Ruffalo,* 390 U. S. 544; 88 S. Ct. 1220, 20 L. Ed. 2d 117, 1968, in the course of a disbarment proceeding, an additional charge 13 was added. This Court held that adding the charge denied procedural due process: the lawyer was entitled to prior notice that the matter in Charge 13 would be considered a disbarment offense.

Had Hubbard been accorded an evidentiary hearing, with specific findings of fact and conclusions of law, as required by Rule 52, the appeal would have been structured by the findings. Hubbard then could not have been faced with (1) ex parte statements from other cases, (2) untried charges not listed in the post trial motion, and (3) untried charges from the subsequent retrial before Judge Decker, F. R. C. P. 52; F. R. Cr. P. 42.

Irrespective of whether Rule 52 required specific findings of fact and conclusions of law in the order granting the new trial [February 28, 1966], such findings were required when the court later [October 10, 1966] decided to use that collateral determination as the sole factual basis for its "costs" judgment against Hubbard. (A. 623, 627-630)

The object of Rule 52, requiring specific findings of fact

and law, is to define the issues for appellate review and for application of the doctrine of *res judicata.* (5 Moore, Federal Practice, § 52.02(5), citing committee report).

That the opinion giving the plaintiff a new trial is inadequate to fulfill the requirements of Rule 52(a) is shown by the Court of Appeals' resort to other cases, and to untried charges not relied on by Judge Robson.

The law is clear that if the findings are too general to satisfy the rule, the reviewing court may not "search the record and supply findings which the trial court failed to make." *Kelley* v. *Everglades Drainage District,* 319 U. S. 415, 418, 63 S. Ct. 114, 87 L. Ed. 1485, 1487 (1943); *Gregory* v. *City of Chicago,* 37 U. S. Law Week 4213, 4215 (March 10, 1969), citing *In re Oliver,* 333 U. S. 257, 273 (1948) on this point.

To the extent that the opinion of the Court of Appeals relied on matter from the retrial, from other cases and from matters not relied on by Judge Robson in entering the judgment appealed from, the Court has exercised original, rather than appellate jurisdiction.

The patent inadequacy of the trial court's opinion as findings of fact is perhaps best illustrated in connection with the charge that Hubbard prevented the appearance of Butterfield, by causing Singleton to refuse to release her from a scheduled deposition. To warrant any proceeding against Hubbard personally, he must necessarily have communicated with Singleton or his office after Hamlin testified on November 16, 1965, to request them to refuse to release Butterfield on Nov. 17, 1965.

But, the court did not find that Hubbard actually did anything. The court, rather, avoids a finding, by using such evasive, but emotionally-colored, phraseology as

(a) he "*hamstrung* plaintiff's counsel in precluding the appearance of an out of town court reporter to testify . . ." (A. 35);

(b) "... *indications are* that counsel [Hubbard] manipulated matters so that the court reporter would not be available . . ." (A. 40);

(c) "It is therefore evident that improper pressure *could have been* brought to bear to preclude the release of the court reporter . . ." (A. 41) (Emphasis supplied.)

The law is concerned with actualities, not speculation. Such language most certainly is inadequate to constitute a "finding" under either Rule 52(a), F. R. C. P., or the contempt rule, Rule 42(a), F. R. Cr. P.

Nor is the statement, quoted *supra*, p. 5, that Hubbard uses "every sly trick and stratagem to win his cases", a finding or a certificate which "recite(s) the facts" within the foregoing rules. *Widger* v. *U. S.*, 244 F. 2d 103, 107 (C. A. 5, 1957); *Tauber* v. *Gordon*, 350 F. 2d 843, 847 (C. A. 3, 1965).

As the latter court pointed out (350 F. 2d at p. 845):

> "Such a *general characterization* of behavior over a seven day trial period is not specific enough to satisfy the requirement of Rule 42a . . ."
>
> "This requirement is more than a formality. It is essential to disclosure of the basis of decision to permit *informed appellate review.*"
>
> "But, counsel's enumeration of occurrences which, in his view after the event, afforded a proper basis for the contempt order cannot be substituted for the required specification by the trial judge * * *" (emphasis supplied).

See also *Gregory* v. *City of Chicago*, 37 U. S. Law Week 4213, 4215 (3-10-69).

28 U. S. C., § 1927 was not enacted to permit a federal court to ignore the foregoing constitutional limitations.

There was not the slightest semblance of due process in these proceedings against Reese Hubbard.

3. The decision is in direct conflict with *In re Murchi-*

son, 349 U. S. 133, 99 L. ed. 942, 75 S. Ct. 623. The outcome of this proceeding turned on evidence of events which took place outside Judge Robson's presence, *e.g.,* the substance of various telephone calls to and in Las Vegas, Nevada on November 16, 1965. (See p. 19, *supra.*) Hence, it was error for the court to retain this phase of the case, after transferring the rest of the case to another judge. (A. 67-83) F. R. Crim. Pr. 42(b).

Further, the trial court improperly denied Hubbard's demand for jury trial of the fact issues. (A. 84-124, 138, 139) 18 U. S. C. §1(3), 402. U. S. Const., Amend. VI, VII.

4. Certiorari should be granted to review the unprecedented, and, we submit, dangerously unconstitutional process by which the Court of Appeals, and the trial court, in its fact finding, went beyond the record in this case, and considered conclusively certain past decisions in which Reese Hubbard was not a party, as evidence of a general disposition to engage in "objectionable trial strategy."

In *Michelson* v. *United States,* 335 U. S. 469, 69 S. Ct. 213, 93 L. Ed. 168 (1948) this Court expressed the public policy of the common law as follows:

> "* * * The State may not show defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime. The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge. * * *"

More recently, Chief Justice Warren stated in *Spencer* v. *State of Texas,* 385 U. S. 554, 87 S. Ct. 648 (1967):

> "* * * While this Court has never held that the use of prior convictions to show nothing more than a disposition to commit crime would violate the Due

> Process Clause of the Fourteenth Amendment, our decisions exercising supervisory power over criminal trials in federal courts, as well as decisions by courts of appeals and of state courts, suggest that evidence of prior crimes introduced for no purpose other than to show criminal disposition would violate the Due Process Clause. * * * Of course it flouts human nature to suppose that a jury would not consider a defendant's previous trouble with the law in deciding whether he has committed the crime currently charged against him. * * *''

The basis of the rule is succinctly stated by Wigmore as follows (1 Wigmore on Evidence, § 57, p. 456):

> ''The policy of the Anglo-American law is more or less due to the inborn sporting instinct of Anglo-Normandom—the instinct of giving the game fair play even at the expense of efficiency of procedure. This instinct asserts itself in other departments of our trial-law to much less advantage. But, as a pure question of policy, the doctrine is and can be supported as one better calculated than the opposite to lead to just verdicts. **The deep tendency of human nature to punish, not because our victim is guilty this time, but because he is a bad man and may well be condemned now that he is caught,** is a tendency which cannot fail to operate with any jury, in or out of court. There are also indirect and more subtle disadvantages.'' (Emphasis supplied.)

That the prejudicial effect of such improper matter is not limited to juries is compellingly shown in this case in both opinions below which place reliance thereon.

Further, the past cases relied on by the courts below are capable of easy explanation, and do not even reflect on the general character of Reese Hubbard. As an example, *Quality Molding Co.* v. *American Nat. Bank*, 287 F. 2d 313, 316 (1961), on which the Court places its principal reliance, was handled by other members of the office, exclusive of Reese Hubbard.

The omission of the clause "when the appellant entered and took possession of the property and exercised its rights of ownership over the same," 287 F. 2d 316, from a quotation in a brief, did not render that quotation misleading.

The issue in the quoted case was whether an eminent domain judgment bore interest during the landowner's appeal. Under the statute, Cahill's Ill. R. S. 1931, ch. 47, § 10, the order upon the report of the jury was not a judgment unless and until the condemnor took possession. Therefore, there was no judgment until the condemnor took possession. The citation was thus squarely in point. Finally, *Quality Molding* was later held to be a wrong interpretation of the Illinois law regarding interest on judgments. *Pinkstaff* v. *Pennsylvania R.*, 31 Ill. 2d 518, 522 (1964).

Nor was Hubbard guilty of misconduct in *Ryan* v. *Monson*, 33 Ill. App. 2d 406. Hubbard procured a transcript of the proceeding and in his answer in detail showed that there is no basis for any of Judge McCormick's criticism. (A. 100-119)

In the case of *Cline* v. *Kirschwehm Bros.*, 42 Ill. App. 2d 85, Judge McCormick made similar criticism of Kirkland, Ellis, Hodson, Chaffetz & Masters, one of the largest and most highly respected law firms of Illinois. That case was tried before the Honorable Wilbert F. Crowley, one of Illinois' most highly respected judges. Judge Crowley stated under oath that Reese Hubbard has always conducted himself properly before him. (A. 126)

As to the Court of Appeals' statement (*infra*, p. A. 28) concerning *People ex rel. General Motors Corp.* v. *Bua*, 37 Ill. 2d 180, Reese Hubbard's Answer denied "that Reese Hubbard had any part in determining whether records of General Motors would be produced, and as to which records should be produced." (A. 119-120.) The discovery deci-

sions were made by staff counsel of General Motors, as the opinion of the Illinois Supreme Court duly reflects. 37 Ill. 2d 180 at pp. 186 ("production in Detroit"), 187 ("one of its staff attorneys"). Hubbard was nowhere named.

Nor is the reference by the Court of Appeals to events at the subsequent retrial of the injury case proper or relevant. (*Infra,* p. A. 28) Judge Decker's statement was simply based upon an erroneous conception of the evidence point involved.

At the first trial plaintiff had testified:

"Q. Were any items stolen from your purse?
A. No."

Hubbard objected to the question and the answer was stricken. (A. 196-197)

On the second trial Hubbard, after giving the court the page of the transcript, asked plaintiff whether she was asked the above question and whether she gave that answer. (A. II, 277-278)

Plaintiff answered: "That I don't remember." (A. II 278) No objection was made to the question.

Hubbard afterwards read the question and answer into evidence as an admission. (A. II 639) Nor was objection made at this time.

The judge's subsequent criticism of this action, quoted by the Court of Appeals (*infra,* p. A. 29) is premised on a misunderstanding of Illinois law regarding admissions.

"Any statement of a party no matter when or how made is admissible as an admission." 18 Illinois Law & Practice, Evidence, § 131, pp. 262-263. See also, *Susemiehl* v. *Red River Lumber Co.,* 306 Ill. App. 430, 435, 28 N. E. 2d 143 (1940), *aff'd.* 376 Ill. 138, 33 N. E. 2d 211 (1941).

If this opinion below, affirming a judgment entered against a trial lawyer without a hearing, is allowed to

stand, it will become the classic illustration of how basic guarantees may be eroded, how if certainty of wrongdoing is thought to appear, there is no need of a trial. Here a lawyer is punished, but at other times, this standard has cost many a simple man his life.

Attorney's Fees.

5. The judgment assessing one-third of all attorney's fees in the lengthy three appeals is without foundation in American law, and is in direct conflict with Rule 39(c, e) [quoted *infra*, p. A. 5] of the recently enacted Federal Rules of Appellate Procedure, as well as with this Court's recent decision in *Fleischmann* v. *Maier Brewing Co.*, 386 U. S. 714, 87 S. Ct. 1404, 18 L. Ed. 475 (1967). *Accord, Consolo* v. *Federal Maritime Commission*, 383 U. S. 607, 616, 16 L. Ed. 2d 131, 138-139, 86 S. Ct. 1018 (1966).

Rule 39(c) extended the costs allowable on appeal to briefs. Had counsel fees been within this Court's contemplation when it made these recent amendments, they could easily have been permitted.

Similarly, Rule 39(e) makes taxable in the district court the costs of the reporter's transcript, the bond premiums and the filing fee in the district court. The Court of Appeals was thus not authorized to direct the trial court to determine and tax one-third of all counsel fees on appeal.

Neither the court's opinion, nor the plaintiff's briefs below, cited authority for the unusual order. Indeed, plaintiff's counsel at no time ever requested such an award of attorney's fees on appeal.

The award of attorney's fees should be reversed.

6. In making an unsolicited award of attorney's fees, after partially reversing the judgment below, the opinion is in direct conflict with 28 U. S. C., § 1912 (quoted *infra*, p. A. 6), which limits the award of extra costs to cases in

which the judgment appealed from has been "affirmed." Further, the amount of the costs which may be awarded is limited to "single or double costs."

The instant opinion is in direct conflict with *Consolo* v. *Federal Maritime Commission,* 383 U. S. 607, 616, 16 L. ed. 2d 131, 138-139, 86 S. Ct. 1018 (1966), which expressly stated that "additional costs, *although not attorney's fees,* may be assessed against * * * the losing party under 28 U. S. C., § 1912." (Emphasis supplied.)

Further, it has been uniformly held that for 28 U. S. C., § 1912, giving a Court of Appeals or the Supreme Court the power to assess "double costs" to operate, the court must find that the appeal is frivolous and has been prosecuted solely for delay. Normally, such an order is made only when an appeal has been dismissed on motion as unsubstantial or frivolous. *Deming* v. *Carlisle Packing Co.,* 226 U. S. 102, 57 L. Ed. 140, 33 S. Ct. 102.

Where, however, the judgment appealed from is reversed or simply reduced, it has been held that a court is without power to assess additional costs under this section. *Globe Const. Co.* v. *Brewer,* 197 F. 2d 707, 708-709 (C. A. 5, 1952).

Further, even if the judgment is affirmed, extra costs will be denied, where, as here, the issues are novel and the appeal has been taken in good faith. *Petition of World Tradeways Shipping Ltd.,* 373 F. 2d 860, 862 (C. A. 2, 1967).

7. In awarding attorney's fees on appeal, after substantially reducing the judgment, the instant case is the civil counterpart of two criminal decisions which are currently being reviewed by this Court: *Simpson* v. *Rice,* 396 F. 2d 499, 500 (C. A. 5, 1968), *affirming* 274 F. Supp. 116, 119-121 (M. D. Ala. 1967) *cert. granted* (No. 418) 393 U. S. 922, 89 S. Ct. 292; *North Carolina* v. *Pearce,* 397 F. 2d 253 (C. A. 4, 1968), *cert. granted* (No. 413) 393 U. S. 932, 89 S. Ct. 258, 21 L. Ed. 2d 268.

See also *Marano* v. *U. S.*, 374 F. 2d 583 (C. A. 1, 1967); *Patton* v. *North Carolina*, 256 F. Supp. 225 (W. D. N. Car. 1966), *aff.* 381 F. 2d 636 (C. A. 4, 1967).

In these cases it was held that a criminal defendant's right of appeal was substantially impaired, if a court could impose an increased sentence on remandment.

Here, Reese Hubbard's appellate counsel succeeded in having the judgment against him reduced by more than 78 per cent, from $8,171.56 to $1,741.20, by eliminating $6,430.36 of patently illegal items from the award. Nevertheless, the Court of Appeals then restored the $6,430.36 of cuts by its award of appellate costs. (R. 7, *infra*, p. A. 32)

The opinion (*infra*, p. A. 32) awards $1,959.70 of printing fees against Reese Hubbard despite his partially successful appeal. Such action constituted a gross abuse of discretion.

Further, it awards to plaintiff's counsel one-third of all their attorney's fees on the three appeals. (R. 7, *infra*, p. A. 32) In view of the length of the record, and the complexity of the issues on the three appeals, Reese Hubbard could well be faced with a more severe judgment than that from which he appealed.

That possibility, in any case, civil or criminal, we submit, necessarily "penalizes" or "chills the right of appeal." *U. S.* v. *Ewell*, 383 U. S. 116, 127-128, 86 S. Ct. 773, 15 L. Ed. 2d 627, 635 (1966); *Cichos* v. *Indiana*, 385 U. S. 76, 81, 87 S. Ct. 271, 274, 17 L. Ed. 2d 175, 179-180 (1966).

(Expert Witness Fees.)

8. The decision, in awarding expert witness fees, is in direct conflict with the decision of this Court in *Henkel* v. *Chicago, St. Paul, M. & O. Ry. Co.*, 284 U. S. 444, 52 S. Ct. 223, 76 L. ed. 386 (1932), and with the following decisions from other circuits: *Motion Picture Patents Co.* v. *Steiner*, 201 Fed. 63 (2d Cir. 1912); *Green* v. *American Tobacco Co.*,

304 F. 2d 70, 77 (5th Cir. 1962); and *Euler* v. *Waller*, 295 F. 2d 765, 766 (10th Cir. 1961); and *Marquez* v. *American Export Lines*, D. C. N. Y., 1967, 41 F. R. D. 386. These latter decisions have been express that a district court lacks such authority.

Directly in point is *Motion Picture Patents Co.* v. *Steiner*, 201 Fed. 63, 65 (C. A. 1912), which expressly held that vexatious conduct of an opponent can not transform into costs matters such as expert witness fees, which would otherwise not be costs.

The judgment for $675.00 in expert witness fees for the first trial should be reversed.

(AS TO THE CLIENT, LAS VEGAS HACIENDA, INC.).

1. There was an adequate basis in the record made by this defendant for the courts below to rule on plaintiff's motion for a new trial. Resort to *ex parte* comments from opinions in other cases, involving parties not in privity with this defendant, constituted a deprivation to this defendant of a fair trial and a fair appeal.

Such action of the trial court and the Court of Appeals violates the safeguards imposed by the law of *res judicata*, and by the due process clause. Such action is in conflict with this Court's decisions in the following cases, *Hansberry* v. *Lee*, 311 U. S. 32, 40-41, 85 L. Ed. 22, 26, 61 S. Ct. 115, 132 A. L. R. 741; *U. S.* v. *Pink*, 315 U. S. 203, 216, 86 L. Ed. 796, 810, 62 S. Ct. 552, with the following decisions from the Seventh Circuit, *Binks Mfg. Co.* v. *Ransburg Electro-Coating Corp.*, 281 F. 2d 252, 260 (C. A. 7, 1960), and from the Fourth Circuit, *Moore* v. *United States*, 360 F. 2d 353, 358 (C. A. 4, 1966). (Wife not bound by husband's income tax conviction in civil tax fraud proceeding, even though she signed joint return.)

See also *Alderman* v. *U. S.*, 37 U. S. Law Week 4190, 4191

(3-11-69, and *Kolod* v. *U. S.*, 390 U. S. 136, 138, 19 L. Ed. 2d 962, 964, 88 S. Ct. 752 (1968) on the importance of an "adversary" "evidentiary" determination of all issues in a case.

It would constitute a profound inequity and discrimination against the clients of aged or experienced trial lawyers, if they were bound by every matter ever litigated adversely to their counsel in his entire career. The opinion cites no authority supporting the proposition that an attorney's clientele throughout his career are in sequential privity.

Moreover, even if the insurmountable barrier of lack of privity could be bridged, the same fundamental considerations of public policy that bar introduction of past offenses to show a general disposition to commit crime, would require review and reversal of the decision below.

Those considerations have been stated by this Court as follows: *Michelson* v. *United States,* 335 U. S. 469, 69 S. Ct. 213, 93 L. Ed. 168 (1948)

> "* * * The State may not show defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime. The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge. * * *"

More recently, Chief Justice Warren has said in *Spencer* v. *Texas,* 385 U. S. 554, 87 S. Ct. 848 (1967)

> "* * * while this Court has never held that the use of prior convictions to show nothing more than a disposition to commit crime would violate the Due Process Clause of the Fourteenth Amendment, our decisions exercising supervisory power over criminal trials in federal courts, as well as decisions by courts of appeals

> and of state courts, suggest the evidence of prior crime introduced for no purpose other than to show criminal disposition would violate the Due Process Clause * * *".

A leading secondary authority highlights the criticism of the prior offense testimony as follows:

> "* * * The deep tendency of human nature to punish, not because our victim is guilty this time, but because he is a bad man and may well be condemned now that he is caught, is a tendency which cannot fail to operate with any jury, in or out of court. * * *" 1 Wigmore on Evidence, § 57, p. 456.

Reference to prior offenses has long been the subject of severe criticism. See Comment, 78 Harvard L. Rev. 426 (1964); Comment, 70 Yale L. J. 763 (1961); 10 Rutgers Law Review, 531, 532 (1956); 3 Wigmore, Evidence, §§ 896-918 (3rd ed. 1940).

All that the reference to other cases shows is that this defendant was deprived of a fair trial and appeal by an atmosphere of prejudice against its counsel, Reese Hubbard, which long antedated this case.

2a. The decision is in conflict with the decision of this Court in *Mutual Life Ins. Co.* v. *Hillmon,* 145 U. S. 285, 36 L. Ed. 706, 12 S. Ct. Rptr. 909 (1892), with a past decision of the Seventh Circuit in *American Cooperative Serum Assn.* v. *Anchor Serum,* 153 F. 2d 907, 912 (1946), and with the following decisions of the Second Circuit: *U. S.* v. *Annunziato,* 293 F. 2d 373, 376-378 (C. A. 2 1961); *DeRonde* v. *Gaytime Shops, Inc.,* 239 F. 2d 735 (C. A. 2 1957). See also *Keshner* v. *Keshner,* 376 Ill. 354, 55 N. E. 2d 877 (1941); VI Wigmore on Evidence, 3rd Ed. (1940) §§ 1725, 1729, 1730, pp. 79-85, 91, 93-94. (See p. 11, *supra.*)

Under the foregoing decisions the declarations of Carl Kiefel, plaintiff's husband, to the maid and telephone operator, were erroneously refused admission in evidence at

the second trial. (A. II 615) Such action constituted prejudicial, reversible error.

The declaration to the telephone operator Tracy was that he had had words with his wife and that she had chained him out of the room. (A. 609)

Although Carl Kiefel had previously been dismissed as a party, such evidence was admissible under an exception to the hearsay rule showing motive, intent, design or state of mind, illustrated by the above authorities. Such evidence thus bore importantly on what Judge Robson described as the first critical issue of the case, namely "(1) who inflicted the injuries, her [then] husband, or an intruder?" (A. 35)

Similarly, the erroneously excluded evidence of Carpenter, the maid, bore on what the court described as the second critical issue of the case, namely "(2) If an intruder, did he gain entrance through plaintiff's contributory negligence by virtue of an unlatched door. . . ." (A. 35) The Carpenter evidence was that Kiefel told her, when she admitted him to the room, that he had told his wife to leave the door open, that he was coming up, and when he got back to the room, the door was locked. (A. 604)

2b. The decision is in conflict with *U. S.* v. *Annunziato* (1961), 2 Cir., 293 F. 2d 373, 377; *Yarborough* v. *Prudential Ins. Co.* (1938), 5 Cir., 99 F. 2d 874, 100 F. 2d 547. See also *Fitzgerald* v. *Benner* (1906), 219 Ill. 485, 494, 76 N. E. 709, which states the further exception to the hearsay rule respecting utterances which relate to and throw light on or explain a nonverbal act which is independently admissible. See 31 Yale L. J. 229, 236; McCormick, Evidence (1954), pp. 586-587.

Kiefel's declaration to the maid, who had to let him in the room with her pass key, explains why Kiefel did not

pick up the second key at the desk: he expected the door to be open. (See pp. 11-12, *supra.*)

Similarly, Kiefel's statement to the operator concerning his fight with his wife threw light on evidence (1) that he disregarded orders of the security chief and picked up the assault weapon, thereby destroying fingerprints; and (2) that he did not render assistance to the wife and did not accompany her to the hospital, although critically injured. (See pp. 11-12, *supra.*)

2c. The decision is in direct conflict with *Forsyeth* v. *Doolittle,* 120 U. S. 73, 30 L. Ed. 586 (1877); *Miller* v. *Mathias,* 145 Ill. App. 465 (1908); *Toler* v. *Bishop,* 84 Ill. App. 278 (1899), which recognize a third exception to the hearsay rule, relating to declarations by one joint tenant or occupant of premises as admissible against the other.

Plaintiff's husband contracted for the trip and the room for both himself and plaintiff. He also acted as her agent in making the payment of $376 for transportation and for the room for himself and plaintiff. They occupied the room jointly. Hence, statements of Carl Kiefel respecting their use and occupancy of the room were admissible against plaintiff. No issue is more relevant in this case than whether the door was (a) left unlocked, (b) locked, or (c) locked and chained. (See p. 12, *supra.*)

The foregoing legal points were Hacienda's principal contentions of error respecting the second trial. They were Points I and II of Hacienda's brief and reply brief. But, they were completely ignored by the Court of Appeals. (A. 32-34)

Under F. R. C. P., 43 (*infra,* p. A. 2) the courts below were required to receive any evidence admissible under either federal or state rules of evidence. *U. S.* v. *Featherstone,* C. A. 10, 1963, 325 F. 2d 540, 542; *Rain* v. *Pavkov* (1966), 3rd Cir., 357 F. 2d 506, 509-510. Such rules can not

be mere matters of "tactical interplay," as the Court of Appeals erroneously suggests. (*Infra*, p. A. 33)

Review should be granted to determine whether under Rule 43, F. R. C. P., a federal district court or Court of Appeals has any discretion to reject evidence which is competent under both state and federal law.

The erroneous disregard of Hacienda's most important legal contentions respecting the second trial by both the trial court and the Court of Appeals, must have been prompted by the courts' improper consideration of past criticisms of Reese Hubbard in opinions from cases involving other parties.

3. The decision is in conflict with *Tennant* v. *Peoria & P. U. Ry. Co.*, 321 U. S. 29, 35, 64 S. Ct. 409, 412, 488 L. Ed. 520 (1944) and with the following decisions of the Courts of Appeals: *Duncan* v. *Duncan*, 377 F. 2d 49 (C. A. 6, 1967); *Berner* v. *British Commonwealth Pacific Airlines, Ltd.*, 346 F. 2d 532 (2d Cir. 1965), *cert. denied*, 382 U. S. 983, 86 S. Ct. 559, 15 L. Ed. 2d 472 (1966); *Lind* v. *Schenley Industries, Inc.*, 278 F. 2d 79 (3d Cir.) (*En banc*) (1960), *cert. denied*, 364 U. S. 835, 81 S. Ct. 58, 5 L. Ed. 2d 60 (1960) and *Fassbinder* v. *Pennsylvania R. R. Co.*, 322 F. 2d 859 (3rd Cir. 1963) (*En banc*), to the extent that it permits the trial court to grant a new trial simply because the court dislikes the verdict, or the successful attorney.

In each of the foregoing Court of Appeals decisions a jury verdict, set aside by a trial judge, was reinstated on appeal, as a result of the reviewing court's recognition of the fundamental collision between the parties' constitutional right to a jury's verdict, and the trial judge's right to set aside that verdict if the latter right is unlimited, the former right is reduced to a mere nullity.

As has been shown above, pp. 9-15, evidence does not sustain the three charges of "objectionable trial strategy" relied on by the court:

1. Presenting Tracy as a witness would have been a useless gesture under the court's erroneous evidence ruling, which excluded anything said by Carl Kiefel. (A. 558-559)

Plaintiff's counsel knew Tracy's name was on the pretrial list, and had recently taken her statement. (A. 11, 12, 42) If he wished to bar mention of her testimony in Hubbard's opening statement, he could easily have moved for a protective order. Failing that, he ought to have objected to the opening statement when made, and not waited until the filing of the post trial motion.

2. Hubbard had no duty to file the uncertified Hamlin deposition, rather than return it to the court reporter for certification. (See pp. 12-13, *supra.*)

3. Plaintiff's inability to bring the reporter Butterfield to Chicago on one day's notice did not warrant the grant of a new trial, in view of plaintiff's failure to move for a continuance to accommodate the reporter's schedule. (See cases cited *supra,* p. 14.)

Certiorari should be granted and the original judgment in favor of defendant, Las Vegas Hacienda, Inc., should be reinstated.

CONCLUSION.

The petition of Hubbard, the trial lawyer, should be granted and the judgment against him vacated, because the entire "costs' proceeding is without valid precedent and is in fundamental conflict with the statute designed to protect the independence of trial lawyers to represent their clients.

Alternatively, Hubbard prays that certiorari be granted and

1. the award of expert witness fees be vacated, and
2. the remand for assessment against Hubbard of opposing counsel's fees on appeal be vacated, or

3. that the matter be remanded to the district court for a proper evidentiary hearing.

Las Vegas Hacienda prays that certiorari be granted and that the original judgment in its favor be reinstated, or that a new trial be granted.

Respectfully submitted,

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APPENDIX A.

STATUTES, RULES AND CONSTITUTIONAL PROVISIONS.

FEDERAL RULES OF CIVIL PROCEDURE.

RULE 30. *Depositions Upon Oral Examination.*

* * * * *

(e) Submission to Witness; Changes; Signing. When the testimony is fully transcribed the deposition shall be submitted to the witness for examination and shall be read to or by him, unless such examination and reading are waived by the witness and by the parties. Any changes in form or substance which the witness desires to make shall be entered upon the deposition by the officer with a statement of the reasons given by the witness for making them. The deposition shall then be signed by the witness, unless the parties by stipulation waive the signing or the witness is ill or cannot be found or refuses to sign. If the deposition is not signed by the witness, the officer shall sign it and state on the record the fact of the waiver or of the illness or absence of the witness or the fact of the refusal to sign together with the reason, if any, given therefor; and the deposition may then be used as fully as though signed, unless on a motion to suppress under Rule 32 (d) the court holds that the reasons given for the refusal to sign require rejection of the deposition in whole or in part.

(f) Certification and Filing by Officer; Copies; Notice of Filing.

(1) The officer shall certify on the deposition that the witness was duly sworn by him and that the deposition is a true record of the testimony given by the witness. He shall then securely seal the deposition in an envelope indorsed with the title of the action and marked "Deposition of (here insert name of witness)" and shall promptly file it with the court in which the action is pending or send it by registered or certified mail to the clerk thereof for filing.

(2) Upon payment of reasonable charges therefor, the officer shall furnish a copy of the deposition to any party or to the deponent.

(3) The party taking the deposition shall give prompt notice of its filing to all other parties.

RULE 43. *Evidence.*

(a) Form and Admissibility. In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by these rules. All evidence shall be admitted which is admissible under the statutes of the United States, or under the rules of evidence heretofore applied in the courts of the United States on the hearing of suits in equity, or under the rules of evidence applied in the courts of general jurisdiction of the state in which the United States court is held. In any case, the statute or rule which favors the reception of the evidence governs and the evidence shall be presented according to the most convenient method prescribed in any of the statutes or rules to which reference is herein made. The competency of a witness to testify shall be determined in like manner.

RULE 52. *Findings by the Court.*

(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41 (b).

(b) Amendment. Upon motion of a party made not later than 10 days after entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly. The motion may be made with a motion for a new trial pursuant to Rule 59. When findings of fact are made in actions tried by the court without a jury, the question of the sufficiency of the evidence to support the findings may thereafter be raised whether or not the party raising the question has made in the district court an objection to such findings or has made a motion to amend them or a motion for judgment.

RULE 61. *Harmless Error.* No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by

the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

RULE 42. *Criminal Contempt.*

(a) Summary Disposition. A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the judge and entered of record.

(b) Disposition Upon Notice and Hearing. A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the United States attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to a trial by jury in any case in which an act of Congress so provides. He is entitled to admission to bail as provided in these rules. If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent. Upon a verdict or finding of guilt the court shall enter an order fixing the punishment.

RULE 39 FEDERAL RULES OF APPELLATE PROCEDURE FOR U. S. COURTS OF APPEALS.

RULE 39. *Costs.*

* * * * *

(c) Costs of Briefs, Appendices, and Copies of Records: The cost of printing or otherwise producing necessary copies of briefs, appendices. or copies of records authorized by Rule 30(f) shall be taxable in the court of appeals at rates not higher than those generally charged for such work in the area where the clerk's office is located. A party who desires such costs to be taxed shall state them in an itemized and verified bill of costs which he shall file with the clerk, with proof of service, within 14 days after the entry of judgment.

* * * * *

(e) Costs On Appeal Taxable In the District Courts. Costs incurred in the preparation and transmission of the record, the cost of the reporter's transcript, if necessary for the determination of the appeal, the premiums paid for cost of supersedeas bonds or other bonds to preserve rights pending appeal, and the fee for filing the notice of appeal shall be taxed in the district court as costs of the appeal in favor of the party entitled to costs under this rule.

STATUTES.

18 U. S. C. A., § 401.

§ 401. *Power of court.*

A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—

(1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;

(2) Misbehavior of any of its officers in their official transactions;

(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command. June 25, 1948, c. 645, 62 Stat. 701.

28 U. S. C. A., § 1912.

§ 1912. *Damages and costs on affirmance.*

Where a judgment is affirmed by the Supreme Court or a court of appeals, the court in its discretion may adjudge to the prevailing party just damages for his delay, and single or double costs. June 25, 1948, c. 646, 62 Stat. 954.

28 U. S. C. A., § 1913.

§ 1913. *Courts of appeals.*

The fees and costs to be charged and collected in each court of appeals shall be prescribed from time to time by the Judicial Conference of the United States. Such fees and costs shall be reasonable and uniform in all the circuits. June 25, 1948, c. 646, 62 Stat. 954.

28 U. S. C. A., § 1920.

§ 1920. *Taxation of costs.*

A judge or clerk of any court of the United States may tax as costs the following:

(1) Fees of the clerk and marshal;

(2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;

(3) Fees and disbursements for printing and witnesses;

(4) Fees for exemplification and copies of papers necessarily obtained for use in the case;

(5) Docket fees under section 1923 of this title.

A bill of costs shall be filed in the case and, upon allowance, included in the judgment or decree. June 25, 1948, c. 646, 62 Stat. 955.

28 U. S. C. A., § 1923.

§ 1923. *Docket fees and costs of briefs.*

(a) Attorney's and proctor's docket fees in courts of the United States may be taxed as costs as follows:

$20 on trial or final hearing (including a default judgment whether entered by the court or by the clerk) in civil, criminal, or admiralty cases, except that in cases of admiralty and maritime jurisdiction where the libellant recovers less than $50 the proctor's docket fee shall be $10;

$20 in admiralty appeals involving not over $1,000;

$50 in admiralty appeals involving not over $5,000;

$100 in admiralty appeals involving more than $5,000;

$5 on discontinuance of a civil action;

$5 on motion for judgment and other proceedings on recognizances;

$2.50 for each deposition admitted in evidence.

(b) The docket fees of United States attorneys shall be paid to the clerk of court and by him paid into the Treasury.

(c) In admiralty appeals the court may allow as costs for printing the briefs of the successful party not more than:

$25 where the amount involved is not over $1,000;

$50 where the amount involved is not over $5,000;

$75 where the amount involved is over $5,000.

June 25, 1948, c. 646, 62 Stat. 956; June 18, 1954, c. 304, 68 Stat. 253.

28 U. S. C. A., § 1927.

§ 1927. *Counsel's liability for excessive costs.*

Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case as to increase costs unreasonably and vexatiously may be required by the court to satisfy personally such excess costs. June 25, 1948, c. 646, 62 Stat. 957.

AMENDMENTS TO THE UNITED STATES CONSTITUTION.

U. S. C. A. Const. Amend. 6.

Amendment VI—Jury trial for crimes, and procedural rights.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him, to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defense.

U. S. C. A. Const. Amend. 7.

Amendment VII—Civil trials.

In suits at common law, where the value in controversy shall exceed twenty dollars, the right to trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

U. S. C. A. Const. Amend. V.

Amendment V--Capital Crimes; Double Jeopardy; Self-Incrimination; Due Process; Just Compensation for Property.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

APPENDIX B.

1. OPINION OF THE DISTRICT COURT, ENTERED FEBRUARY 28, 1966, APPEARING AT 39 F. R. D. 592 (1966) AND AT A. 35-41.

DONNA M. KIEFEL, *Plaintiff*,

v.

LAS VEGAS HACIENDA, INC., a California corporation, *Defendant*.

No. 63 C 1982.

UNITED STATES DISTRICT COURT
N. D. Illinois, E. D.

Feb. 28, 1966.

ROBSON, *District Judge*.

Plaintiff moves for a new trial and seeks to have the verdict and judgment thereon against her set aside. Several grounds are advanced. The court concludes that one of those grounds is sufficient basis for the granting of a new trial.

The court is of the opinion that plaintiff has not had a fair trial due to the objectionable trial strategy of defendant's counsel. In substance, those tactics consisted of knowingly making prejudicial insinuations in his opening statement which were not substantiated by evidence. Further, he hamstrung plaintiff's counsel in precluding the appearance of an out-of-town court reporter to testify in respect to an important deposition which had not been filed, in violation of the rules of court. Other less im-

portant conduct occurred in the course of the trial, which alone might not warrant the granting of a new trial, but viewed cumulatively, in conjunction with the aforestated acts, are more than sufficient to make the court conclude that the plaintiff was not accorded a fair chance to present the facts of her case to the jury.

Plaintiff sued in a two-count complaint for damages from an assault in her room in defendant's motel. The first count was in tort and the second in contract. There is no question that the assault occurred and that very serious skull and other injuries were inflicted. The critical questions were: (1) Who inflicted the injuries, her husband or an intruder. (2) If an intruder, did he gain entrance through plaintiff's contributory negligence by virtue of an unlatched door, or plaintiff's negligence due to intoxication, or other circumstance. (3) Did the assault proximately result from defendant's negligence in failing to provide an adequate lock on the door or in not maintaining sufficient security guard in the corridor.

Very snide insinuations were made by defendant's counsel that plaintiff and her husband had had an altercation the previous evening. Counsel indicated he would prove it by the husband's statements to the switchboard operator when he repeatedly, vainly tried to reach his wife in their room in the early hours. Defendant's counsel similarly intimated by cross-examination, along the same line, which questioning would be followed by impeachment, but no impeachment on the subject ever occurred.

The court grants this motion for a new trial solely from its own observation of defense counsel's tactics, irrespective of the citation of similar action by the Illinois courts occasioned by the same counsel's conduct in the same regard (*Ryan* v. *Monson,* 33 Ill. App. 2d 406, 179 N. E. 2d 449 (1961); *Cline* v. *Kirchwehm Bros. Cartage Co., Inc.,* 42 Ill. App. 2d 85, 191 N. E. 2d 410 (1963). The decisions do,

however, furnish corroboration that his acts were not mere happenstance, inadvertently and unintentionally occurring. In contrast, the court notes the strenuous and futile efforts of plaintiff's counsel to combat the insidious effect resulting from the artfully planted statements of defense counsel.

There is an extended discussion of the granting of motions for a new trial in *Lind* v. *Schenley Industries, Inc.*, 278 F. 2d 79 (3rd Cir. 1960). It is there said, at 90:

> "* * * New trials granted because (1) a jury verdict is against the weight of the evidence may be sharply distinguished from (2) new trials ordered for other reasons: for example, evidence improperly admitted, *prejudicial statements by counsel* * * *. In the first instance given it is the jury itself which fails properly to perform the functions confided to it by law. In the latter instances something occurred in the course of the trial which resulted or which may have resulted in the jury receiving a distorted, incorrect, or an incomplete view of the operative facts, or some undesirable element obtruded itself into the proceedings creating a condition whereby the giving of a just verdict was rendered difficult or impossible. In the latter instances, * * * the trial court delivered the jury from a possibly erroneous verdict arising from circumstances over which the jury had no control. Under these conditions there is no usurpation by the court of the prime function of the jury as the trier of the facts and the trial judge necessarily must be allowed wide discretion in granting or refusing a new trial." (Emphasis added.)

The rule of law is stated in 39 American Jurisprudence, New Trial § 53, thus:

> "Misconduct of counsel for one party, if of such a nature as to influence a verdict in favor of that party, or to prevent the adverse party from having a fair trial is * * * ground for a new trial. * * *
>
> "* * * In order to warrant the granting of a new trial, the objectionable conduct must appear to have been prejudicial to the interest of the complaining party. * * *"

Section 54, *ibid:*

> "Improper remarks and comments of counsel for a party, made in the presence and hearing of the jury, if of such character as to influence a verdict, prevent a fair trial * * * and * * * furnish good grounds for a new trial. * * *
>
> "As the right to a new trial may be founded upon counsel's misstatements of facts, or his statements of facts which have not been introduced in, or established by, evidence, frequently a new trial is sought and obtained upon the ground that counsel has made statements or arguments appealing to the emotions and prejudices of the jury."

Section 55, *ibid:*

> "The courts recognize the fact that proof frequently fails to come up to expectation, and the tendency is to permit counsel a reasonable latitude in stating to the jury the facts proposed to be shown, and when no substantial prejudice results * * * a new trial will not be required merely because of reference by counsel, in a civil case at least, in his opening statement to matters which he subsequently makes no attempt to prove. *The rule is different, however, where it is clear that prejudice resulted to the opposing side from the remarks of counsel in his opening statement, which was not cured by the action of the court.* * * *" (Emphasis added.)

Also in point are the numerous decisions and texts cited by plaintiff: Cleary, Handbook of Illinois Evidence § 9.11, p. 144; *Schoolfield* v. *Witkowski,* 54 Ill. App. 2d 111, 203 N. E. 2d 460 (1964); *Gordon* v. *Checker Taxi Co.,* 334 Ill. App. 313, 79 N. E. 2d 632 (1948); *Miller* v. *Chicago Transit Authority,* 3 Ill. App. 2d 223, 121 N. E. 2d 348 (1954); *Marut* v. *Costello,* 53 Ill. App. 2d 340, 202 N. E. 2d 853 (1964); 118 A. L. R. 543; *Duff* v. *Ewing,* 60 Ill. App. 2d 382, 208 N. E. 2d 320 (1965).

The court does not agree that there "was nothing in the opening statement calculated to enflame the jury." State-

ments in respect to a husband-wife rift could have had great weight in the jury's decision as to whether the husband was the culprit in the assault.

The parts of the opening argument of counsel for the defense, which plaintiff cites as unsupported by subsequently presented evidence, are

> "The evidence will show that *the facts* concerning this unfortunate event *are within the knowledge of the plaintiff and her husband, and no one else* that we know of." (R. 5)
>
> * * * * *
>
> "The evidence will show that during that evening that the husband was making repeated telephone calls to this room, and that *the husband told the telephone operator that he and his wife had had a fight,* and that she wouldn't let him in the room." (R. 6)
>
> * * * * *
>
> "Now the room itself, when a person enters the room after you enter the door, to the right is the bathroom, and when the bathroom light is on and the door open, that *light is a strong light* and it shines in the face of anyone that comes in the door, so any person that was looking could see and *recognize such person.*
>
> "The evidence will show that outside the door, and immediately above where the two doors are there is another light, and it was a bright one, so that anyone opening the door, this light would shine on that person, so *even though a person were lying in bed they could see that person as to who that person was.*
>
> "I believe the evidence will show that the plaintiff stated after she had been in bed and had probably gone to sleep, that she looked up and she saw a man who she says was coming through the door, that she said 'Carl,' or something to that effect. She made no outcry whatsoever. * * *
>
> "* * * The evidence will show that she made no outcry." (R. 7-8) (Emphasis added.)

Plaintiff testified she did not recall a bright light shining outside the door, and that the hall seemed quite dark as she walked down it.

On cross-examination, plaintiff was asked if she had any differences of opinion with her husband and she answered no. When reminded that she left, "and alone," she replied she was tired and left to go to bed.

She stated again the light was dim by her door; that it was not real bright. The bathroom door was not wide open. The light from the corridor did not shine on the man. She called out her husband's name, "Carl." She was asked if she called "because you recognized the person you saw, did you not?" She answered, "I did not recognize him."

Mr. Kiefel when asked if he made a telephone call to his room from 2:00 a. m. to 7:00 a. m. said that he did not make one single telephone call. He was then asked: "Isn't it a fact that you began telephoning at 2:00 o'clock and continued telephoning until 7:00?" When an objection was sustained, counsel stated he was asking the question to lay the foundation for impeachment. Mr. Kiefel answered: "It is not." Then followed the question, "Did you, during that period, make between 12 and 14 telephone calls to your room?" The answer again was "I did not. * * * I didn't make any telephone calls during that period. Only at 6:30 when I went back to the room after playing blackjack when I telephoned my wife."

The court has reviewed the testimony of Sharon Hamlin, the nurse on duty in the hospital where plaintiff was taken after the occurrence. There are manifest inconsistencies between her statements, deposition, testimony and hospital records as to the state of consciousness of plaintiff at a time when plaintiff was questioned in the hospital. There are plain indications of the witness's hos-

tility to personal injury suits. She had signed her deposition, she states, which deposition she brought with her to Chicago and left it at defendant's counsel's office, yet that deposition was never filed with the Clerk of the Court. Further, the indications are that counsel manipulated matters so that the court reporter who took the depositions or statements would not be available to appear at this trial to verify from her notes the actual interrogation and answers which took place. At plaintiff's counsel's request, she had agreed to appear here and had purchased her ticket, and at the last moment reneged on the ground that she could not be released from a deposition scheduled for the next day by an attorney who had on occasion represented the insurer of defendant, and in whose offices the critical deposition was taken. Plaintiff's counsel asked that attorney to reschedule the deposition but he refused. Defendant counsel's associate had retained that same Las Vegas attorney to represent defendant in another deposition taken in this cause. It is therefore evident that improper pressure could have been brought to bear to preclude the release of the court reporter from the scheduled deposition in order to prevent her appearance as a witness in the case.

As plaintiff points out, the Canons of Professional Ethics proscribe argument asserting as a fact something which had not been proved, or the introduction of statements into argument with intent to influence a jury (Canon No. 22).

The court is convinced that because of the unprofessional tactics of Reese Hubbard, counsel for defendant, the plaintiff did not have a fair trial. Counsel for defendant is a lawyer who has had long and extensive trial experience. These years in the court should have taught him compassion and a sense of fair play. Instead, he seeks to use his experience to assert and apply every sly trick and stratagem to win his case. He does this with the hope that he can

stay within the bounds of professional ethics. In this instance, he has far overstepped the bounds. This court finds that his trial tactics were such that the jury might or could have been influenced by his unfair actions and as a result found for the defendant.

The motion for new trial is granted.

2. OPINION OF THE COURT OF APPEALS, APPEARING AT 404 F. 2D 1163 AND AT R. 1-16.

DONNA M. KIEFEL, *Plaintiff-Appellee,*

v.

LAS VEGAS HACIENDA, INC., a California corporation, *Defendant-Appellant,*

REESE HUBBARD, *Respondent-Appellant.*

DONNA M. KIEFEL, *Plaintiff-Appellee,*

v.

LAS VEGAS HACIENDA, INC., *Defendant-Appellant.*

Nos. 15933, 15976, 16210.

UNITED STATES COURT OF APPEALS
Seventh Circuit.

Nov. 15, 1968.

As Amended Dec. 31, 1968.

Rehearing Denied Jan. 6, 1969.

Before HASTINGS, FAIRCHILD and KERNER, *Circuit Judges.*

KERNER, *Circuit Judge.*

These cases come before this court on appeals from two separate trials in the district court and an appeal from an order assessing costs and attorneys' fees in the first of the two trials.

Plaintiff-appellee Kiefel and her husband* purchased a

*Divorced shortly after the first trial.

package air travel and hotel plan to Las Vegas in February, 1962. They were lodged in Room 315 of the Las Vegas Hacienda. On the evening and morning of February 28-March 1, 1962, plaintiff and her husband visited three night club shows and consumed several drinks. Returning to their hotel, another drink was had at the bar and plaintiff went off to their room to bed, while her husband remained in the casino stating he remained there until 6:30 a.m. Sometime before 5:20 a. m. someone entered Room 315 and attacked plaintiff, striking her on the head with a bottle of champagne, fracturing her skull and causing severe facial lacerations.

The complaint and amended complaint are founded in contract and tort for failure of defendant, Las Vegas Hacienda, to provide a reasonably safe sleeping room accommodation resulting in the personal injuries to plaintiff.

Case No. 15933

The first trial was heard by the Honorable Edwin A. Robson. After the jury returned a verdict for the defendant, plaintiff filed a motion for a new trial based on defense counsel respondent-appellant Reese Hubbard's alleged acts of misconduct. The court granted the motion and filed an opinion, *Kiefel* v. *Las Vegas Hacienda, Inc.*, 39 F. R. D. 592 (N. D. Ill. 1966). The question presented by this appeal is whether the acts of misconduct were such as to require a new trial.

Plaintiff-appellee cited in her brief on appeal no less than ten items of misconduct involving the first trial and the pre-trial discovery as well as six additional items of misconduct at the second trial. With respect to the first trial, Judge Robson's opinion relied on two of the ten items of misconduct as individually requiring a new trial and further found that the remaining misconduct, when "viewed

cumulatively, in conjunction with the aforestated acts, are more than sufficient to make the court conclude that the plaintiff was not accorded a fair chance to present the facts of her case to the jury." 39 F. R. D. at 593.

The first of the specific acts was the inclusion of statements in Hubbard's opening remarks to the jury which the court found to be capable of inflaming the jury, 39 F. R. D. at 595. The second of the acts was the failure to file a deposition in the case together with causing the reporter who took the deposition to be unavailable as a witness at the trial. 39 F. R. D. at 596.

The motion for a new trial asserted other misconduct including 1) making assertions of facts not proved, 2) attempting to improperly influence the jury by the introduction of statements into argument on matters not in evidence under the pretext of laying a foundation for impeachment which were never offered, 3) examining witnesses on an exhibit which was never offered in evidence, 4) repeatedly making known meritless objections both in the trial and pre-trial phases of the case for the purpose of harassment, 5) falsely stating to the court that he did not have a deposition which he apparently had under his control and probably was in his own office, and 6) objecting to the introduction of a deposition on the ground that he did not authorize it when it was taken under order of court entered after an agreement made by his co-counsel. In response to some of these acts, the court noted, 39 F. R. D. at 596:

> As plaintiff points out, the Canons of Professional Ethics proscribe argument asserting as a fact something which had not been proved, or the introduction of statements into argument with intent to influence a jury (Canon No. 22).

Whether on the basis of the two specific acts discussed by the court or the other acts viewed cumulatively, it is

clear that Judge Robson was correct in granting the motion for a new trial. The legal authority set out in Judge Robson's opinion is sufficient to support his determination. 39 F. R. D. at 594-595. In addition to that authority, we rely on *Mangan* v. *Broderick & Bascom Rope Co.*, 351 F. 2d 24, 29, 31 (7th Cir. 1965), *Ryan* v. *Monson*, 33 Ill. App. 2d 406, 412-413, 415-417, 424 and 427-428 (1st Dist. 1961), and *Cline* v. *Kirchwehm Bros. Cartage Co., Inc.*, 42 Ill. App. 2d 85, 191 N. E. 2d 410 (1963), all cases in which new trials were ordered due to improper trial tactics and unprofessional conduct on the part of the present respondent. We find that Judge Robson was correct in holding, 39 F. R. D. at 596:

> The court is convinced that because of the unprofessional tactics of Reese Hubbard, counsel for defendant, the plaintiff did not have a fair trial. Counsel for defendant is a lawyer who has had long and extensive trial experience. These years in the court should have taught him compassion and a sense of fair play. Instead, he seeks to use his experience to assert and apply every sly trick and strategem to win his case. He does this with the hope that he can stay within the bounds of professional ethics. In this instance, he has far overstepped the bounds. This court finds that his trial tactics were such that the jury might or could have been influenced by his unfair actions and as a result found for the defendant.
>
> The motion for new trial is granted.

Accordingly, we affirm the decision of the district court granting plaintiff-appellee's motion for a new trial.

Affirmed.

Case No. 15976

After the conclusion of the trial before Judge Robson, the plaintiff filed a motion to assess costs and attorneys' fees against defendant Las Vegas Hacienda, Inc., and Reese Hubbard jointly and severally. The court entered a judgment order against defendant and counsel in the sum of Eight Thousand One Hundred Seventy-one Dollars and Fifty-six Cents ($8,171.56) consisting of Six Thousand One Hundred Dollars ($6,100.00) in attorneys' fees and Two Thousand Seventy-one Dollars and Fifty-six Cents ($2,071.56) as costs, and itemized as follows:

Attorneys' fees:

(a) James A. Brandvik, the sum of— for the trial of this cause;	$2,000.00
(b) Lowell H. Jacobson, the sum of— for the trial of this cause;	3,000.00
(c) James A. Brandvik and Lowell H. Jacobson, for services in connection with the post-trial motion—	1,000.00
(d) James A. Brandvik, attorney's fees in connection with the Las Vegas deposition of Sharon Hamlin—	100.00
Total Attorneys' Fees	$6,100.00

Costs:

(a) Claude Youker, reporter's bills—	$ 947.15
(b) Graham & Associates, for service of summons on expert witnesses, mileage and advancement of witness fees—	101.80
(c) Court Reporter Stella Butterfield for copy of Sharon Hamlin deposition not previously filed—	17.25

(d) Expert witness fees for plaintiff's experts as follows:		
1. Dr. Textor	$ 75.00	
2. Dr. Halstead	$250.00	
3. Dr. Cutler	150.00	
4. Locksmith James Busch	200.00	675.00
(e) Air fare to Las Vegas and return regarding deposition of Sharon Hamlin—		230.36
(f) Meals and lodging incurred by Attorney James A. Brandvik in connection with deposition—		100.00
Total Costs		$2,071.56

From this order defendant-appellant and respondent-appellant appeal.

The authority for assessment of costs is set forth in 28 U. S. C. §§ 1920, 1921, 1923 and 1927. The specific items taxable as costs are limited by the express language of the statute. *Farmer* v. *Arabian American Oil Co.*, 379 U. S. 227, 85 S. Ct. 411, 13 L. Ed. 2d 248 (1964); *Braun* v. *Hassenstein Steel Co.*, 23 F. R. D. 163 (D. S. D. 1959) and Federal Rules of Civil Procedure, Rule 54(d). 28 U. S. C. § 1927 provides:

> Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case as to increase costs unreasonably and vexatiously may be required by the court to satisfy personally such excess costs.

This section of 28 U. S. C. relieves Las Vegas Hacienda of any responsibility for costs assessed by the trial court, and any costs assessed are taxable to Reese Hubbard personally.

While it is relatively unusual for a decision to be reversed due to prejudice injected into the trial by an attor-

ney, or to require a new trial therefor, it is uncommon to assess costs on the attorney involved. This is a power which the courts should exercise only in instances of a serious and studied disregard for the orderly processes of justice. In the language of the statute, it is a power which is exercisable only where the effect of the attorney's conduct is such as "unreasonably and vexatiously" increases the costs. The attorney's conduct, described previously, is clearly within these restrictive standards. His acts of misconduct were correctly found to be intentional, involving serious breaches of the Canons of Ethics. In view of Judge Robson's finding of Hubbard's "long and extensive trial experience," we also deem it appropriate to consider Hubbard's conduct in past cases.

Counsel Reese Hubbard's history of past misconduct is well documented in the prior opinions of this court. The first occasion we had to consider his conduct was in *O'Shea* v. *Jewel Tea Co.*, 233 F. 2d 530 (7th Cir. 1956). In the trial of that case, Reese Hubbard offered to produce a witness for the defense who could testify as to whether another witness was not blind; a fact which, if shown, would have permitted a defense exhibit to be introduced into evidence. The witness was not produced and, on appeal, the defense urged that the failure to admit the exhibit was error. In discussing that issue, the court held, 233 F. 2d at 533:

> If counsel for the defendant had witnesses to prove such facts he should have, in fairness to the trial court, introduced their testimony as part of his defense.

The court then also observed that certain statements of the trial judge to which exception was taken on appeal by defendant were, in part, "entirely justified by the actions of defense counsel * * *." 233 F. 2d at 535.

In *Quality Molding Co.* v. *American Nat'l Fire Ins. Co.*, 287 F. 2d 313 (7th Cir. 1961), Reese Hubbard on behalf of the plaintiff, seriously misquoted an important precedent

both in the trial court and in the brief filed in this court. After showing the nature of the misquote, the court held, 287 F. 2d at 316:

> We would much prefer to think the omission of the all important words was inadvertent. However, counsel for defendants states the same omission was made in the District Court, and the misquotation was specifically called to the attention of plaintiff's counsel in the trial brief which was filed by defendants.
>
> A sloppy mistake in a quotation might be at least understandable on the part of a careless attorney. But, a deliberate misquotation calls for a strong condemnation. However, we do not initiate disciplinary action in this Court because there is a bare possibility that the fact that counsel's quotation was not correct might not have come to the personal attention of the attorney preparing the brief in this Court.
>
> Attorneys whose names are affixed to briefs filed in this Court have a heavy responsibility to see to it that quotations from the opinions of other courts as well as other statements therein are completely accurate.

Because of the serious consequences which may result from that type of misconduct, this court was most reluctant to find that the misquote was intentional.

However, the circumstances surrounding the misconduct in *Mangan* v. *Broderick & Bascom Rope Co.*, 351 F. 2d 24 (7th Cir. 1965), left no doubt that this later misconduct was intentional. After objections were sustained to questions offered by Reese Hubbard and his offer of proof for the defense was denied, he persisted in asking a question which improperly injected the issues of workmen's compensation and insurance into the trial. This court described the circumstances and held that the misconduct would justify a new trial for the plaintiff, 351 F. 2d at 29:

> • • • Subsequently, in his examination of one of the treating physicians, counsel asked the physician who

had paid plaintiff's bill and elicited the answer that the insurance company had done so. The question and answer were stricken. Though the court chastised counsel for his *deliberate disobedience to the court's prior admonition,* plaintiff's motion for a mistrial was denied.

* * * * *

In this case, the conduct of defendant's counsel in his cross-examination of Schweitzer's office manager, the doctor and Borchardt *in defiance of the court's admonition* was an act not to be condoned. The motive for such questioning could not have been entirely an attempt to show possible bias of the witnesses. The doctor was not a Schweitzer employee. He could have no possible interest in the case. Borchardt was not a Schweitzer employee as we shall presently show. Thus, even if the judge was correct in his ultimate ruling that evidence of the receipt of workmen's compensation might be adduced to show the possible bias of witnesses, we are still faced here with gross error. *Counsel's willingness to inject that evidence into the case at any cost is sufficient to earn him a new trial for plaintiff.* [Emphasis added.]

This court also warned that other intentional misconduct on his part should not be repeated, 351 F. 2d at 31:

> Finally, the conduct of defendant's counsel in cross-examining a witness upon an exhibit which was not in evidence and which was never offered in evidence was such a *deliberate misuse of the judicial process* that it must not be repeated upon a retrial of this suit. [Emphasis added.]

In *Neusus* v. *Sponholtz,* 369 F. 2d 259 (7th Cir. 1966), Reese Hubbard again engaged in prejudicial cross-examination. The court called attention to the misconduct, 369 F. 2d at 260-261, fn. 2:

> Although we do not reach these questions, the objectionable trial tactics of defense counsel for American, Reese Hubbard, should not escape comment. His con-

duct was very unprofessional in several instances, particularly with respect to his method of cross-examination by unsupported innuendo, and were it not for our resolution of the principle issue a new trial would have to be granted to the plaintiff. * * *

* * * * *

The cross-examination tactic of attorney Hubbard is particularly objectionable in this case because it appears to have been undertaken deliberately and with complete disregard of the consequences. The same counsel has been criticized on a number of occasions for the same tactic and other tactics which are questionable from the standpoint of professional ethics. * * * [Emphasis added.]

The court then cited its earlier opinions on point and the decision of Judge Robson in the first trial of the case now before us.

Respondent Hubbard's unprofessional conduct has also been criticized by the Illinois Supreme and Appellate Courts in opinions entered after our criticism in *Quality Molding*. In *Ryan* v. *Monson*, 33 Ill. App. 2d 406, 179 N. E. 2d 449 (1st Dist. 1961), the court reversed a judgment for the defendant in a personal injury action because Hubbard's various acts of misconduct formed a pattern which permeated the trial and tainted the judgment. Specifically, he harassed opposing counsel during pre-trial discovery; engaged in improper cross-examinations; made erroneous statements of fact to the trial court and of law to the jury; examined a witness on exhibits not in evidence which he did not show to opposing counsel; and made inflammatory statements in closing argument. Id. at 412-413, 415-417, 424 and 427, 179 N. E. 2d 449. The opinion also ordered that the case be remanded for a hearing on a motion to assess expenses and attorney's fees due to the misconduct. Id. at 427-428, 179 N. E. 2d 449. In *Cline* v. *Kirchwehm Bros. Cartage Co., Inc.*, 42 Ill. App. 2d 85, 191 N. E. 2d 410

(1963) a new trial on the issue of damages was ordered because of Hubbard's misconduct including, once again, improper cross-examination and repeated disregard for rulings of the trial judge. Most recently, in *People ex rel. General Motors Corp.* v. *Bua,* 37 Ill. 2d 180, 226 N. E. 2d 6 (1967), Respondent Hubbard was found to have "sought to obstruct the orderly processes of discovery" by harassing opposing counsel contrary to "the spirit of the rules." Id. at 192 and 195, 226 N. E. 2d at 14.

It is important to note that these past acts of misconduct are of the same nature as those engaged in during and preceding the first trial of this case. This is especially so in regard to four types of misconduct: 1) making misstatements of fact and law to the juries and the courts, 2) using harassing and obstructionist tactics in pre-trial discovery, 3) injecting inflammatory statements into argument which were calculated to prejudice the juries, and 4) conducting improper cross-examination on matters not in evidence or on issues to which the court had already sustained objection.

Not satisfied with the lesson he should have learned from the outcome of the first trial and the judgment of costs against him, Hubbard continued his misconduct at the second trial. During the argument on the defendant's motion for a new trial at the end of the second trial, Judge Decker expressed his strong disapproval with the misconduct at the second trial. Judge Decker reprimanded Hubbard for seeking numerous postponements of the second trial and then appearing on the date specifically set asking for a stay due to the appeal in this case which Hubbard had been preparing all along but of which he had never notified the trial court. Hubbard, while reading a deposition aloud changed an answer from "incorrect" to "correct," thus reversing its meaning. He also stated that thousands of motels were equipped with the type of door

lock involved in the case when, in fact, there were not thousands of motels but thousands of locks in a small number of motels. But these were not the gravest acts of misconduct.

At one point, Hubbard stated that Mrs. Kiefel had been asked a question and had answered and represented this as part of her testimony at the first trial. In fact, the question and answer had been stricken at Hubbard's own objection. Judge Decker gave him an opportunity to correct his statement to the jury. When Hubbard did not choose to do so, Judge Decker commented, Appendix vol. II at 761:

> The Court: All right. Well, I don't know what a court—what a Court of Appeals would say as to the propriety of trial tactics should [sic] as you engaged in telling the jury that this was her testimony at the last trial when the record shows that the question and the answer were both stricken. Now, perhaps that will someday be called to the Court's attention.

At the hearing on the defendant's motion for a new trial, Hubbard accused the court of prejudicing the jury by raising his voice. Judge Decker could only recall one instance where he raised his voice and that occurred when Hubbard tried to surreptitiously slip an exhibit into the jury room which had been denied admission more than once. He said, Additional Appendix at 205-06:

> I will plead guilty to at least one occasion when I raised my voice above its normal level. It occurred, however, at the conclusion of the case and out of the presence of the jury when the defendant's counsel presented me with a number of defendant's exhibits which he asked me to have taken to the jury room. It was discovered that included among these exhibits was one particular selected portion of a medical record to which objection had been repeatedly sustained during the trial, not once, but a number of times. *In my*

> *opinion, the insertion of this exhibit which had not been admitted in evidence was not inadvertent.* I can say that a trial judge's patience is not inexhaustible. I did raise my voice. [Emphasis added.]

Just as "No man is an island unto himself" but each has effect on the whole, no attorney stands by himself. Each attorney's acts reflect on the entire profession. Respect for one encourages respect for all while the misconduct of one impairs the integrity of all. The unprofessional conduct in these two trials and in the history of Hubbard's practice as shown by prior appellate opinions is outrageous in nature. In *Quality Molding,* we declined to assume that his misquotation before this court was intentional. We can no longer indulge in an assumption of inadvertence, especially as to the misconduct shown in this case. Nor is there any doubt that Hubbard could be unaware that his conduct could lead to an assessment of costs against him in view of the fact that in *Ryan* v. *Monson,* a remand was had for that very purpose.

While the assessment of costs is provided for by the statute, attorneys' fees are not ordinarily assessed on a party. As stated in *Fleischmann Distilling Corp.* v. *Maier Brewing Co.,* 386 U. S. 714 at 717, 87 S. Ct. 1404 at 1407, 18 L. Ed. 2d 475 (1967):

> The rule here has long been that attorney's fees are not ordinarily recoverable in the absence of a statute or enforceable contract providing therefor. This Court first announced that rule in *Arcambel* v. *Wisemann,* 3 Dall. 306, 1 L. Ed. 613 (1796).

Attorney's travel expenses for taking of depositions are not taxable. *Michigan Aluminum Foundry Co.* v. *Aluminum Co. of America,* 190 F. 903 (CCA 1911) and *Hope Basket Co.* v. *Product Advancement Co.,* 104 F. Supp. 444 (W. D. Mich. 1952).

From and under the application of the various sections of 28 U. S. C. the court finds and concludes:

That the sum of Six Thousand One Hundred Dollars ($6,100.00) comprising attorneys' fees:

(a) James A. Brandvik, the sum of— for the trial of this cause;	$2,000.00
(b) Lowell H. Jacobson, the sum of— for the trial of this cause;	3,000.00
(c) James A. Brandvik and Lowell H. Jacobson, for services in connection with the post-trial motion—	1,000.00
(d) James A. Brandvik, attorney's fees in connection with the Las Vegas deposition of Sharon Hamlin —	100.00
Total Attorney's Fees.....	$6,100.00

are eliminated from the judgment hereinbefore entered.

The court has further considered the costs:

(e) Air fare to Las Vegas and return regarding deposition of Sharon Hamlin—	$ 230.36
(f) Meals and lodging incurred by Attorney James A. Brandvik in connection with deposition—	100.00

and eliminates these items in the sum of Three Hundred Thirty Dollars and Thirty-six Cents ($330.36).

The Court sustains the costs:

(a) Claude Youker, reporter's bills—		$ 947.15
(b) Graham & Associates, for service of summons on expert witnesses, mileage and advancement of witness fees—		101.80
(c) Court Reporter Stella Butterfield for copy of Sharon Hamlin deposition not previously filed—		17.25
(d) Expert witness fees for plaintiff's experts as follows:		
1. Dr. Textor	$ 75.00	
2. Dr. Halstead	250.00	
3. Dr. Cutler	150.00	
4. Locksmith James Busch	200.00	675.00

in the total sum of Seventeen Hundred Forty-one Dollars and Twenty Cents ($1,741.20) against Reese Hubbard personally.

The Court further finds under 28 U. S. C. § 1927 that because of the additional proceedings caused by the conduct of Reese Hubbard, this matter is remanded to the trial judge for assessment of costs against Reese Hubbard for the expenses of printing plaintiff-appellee's 54 page brief and the additional appendix in No. 15976 and a sum no greater than one-third (⅓) the plaintiff-appellee's attorneys' fee incurred in the appeal of cases Nos. 15933, 15976 and 16210.

It is hereby ordered that the district court give and enter judgment in favor of plaintiff, Donna M. Kiefel for the use and benefit of her attorneys, James A. Brandvik and Lowell H. Jacobson, and against Reese Hubbard individually in the amount of Seventeen Hundred Forty-one Dollars and Twenty Cents ($1,741.20) and the additional amounts consisting of no more than one-third plaintiff-appellee's attorneys' fee incurred as a result of the appeal of cases Nos. 15933, 15976 and 16210, and the total cost of printing plaintiff-appellee's 54 page brief and the additional appendix in No. 15976 as reimbursement for costs by plaintiff-appellee's attorneys for and on behalf of plaintiff-appellee.

Affirmed in part, reversed in part, remanded with directions.

Case No. 16210

The second trial was had before the Honorable Bernard M. Decker. At the conclusion of the trial, the jury reached a verdict in favor of plaintiff-appellee Donna Kiefel in the amount of One Hundred Thousand Dollars ($100,000.00) against defendant-appellant Las Vegas Hacienda, Inc. (hereafter called Hacienda). Judgment was entered on the verdict against Hacienda and an order was entered on March 15, 1967, increasing the costs taxed by the clerk by an additional One Hundred Sixteen Dollars and Ten Cents

($116.10). From this judgment and order, Hacienda appeals.

The primary issue raised by this appeal is whether the facts were sufficient in law to support the jury's verdict. The three particular questions asked by Hacienda are:

1. Was the lock actually forced open on the night of the occurrence?

2. Was the assailant an unknown intruder or might it have been Carl Kiefel, plaintiff's husband?

3. Did Donna Kiefel lock the door before going to bed, or did she leave it open for her husband?

The testimony in the record indicates the lock used on the door to Room 315 was a Schlage lock, model A 51-PD. The projection of the bolt in the lock taken from the door is $\frac{3}{8}$ of an inch. Witness James Busch, a master locksmith, testified the lock was defective, since there was $\frac{1}{8}$ of an inch of play or $33\frac{1}{3}\%$ of the total length of the bolt. Additionally, there was testimony that the door was loose fitting and the cutting of the door for the installation of the lock was larger than necessary, allowing additional play of another $\frac{1}{8}$ of an inch, leaving only $\frac{1}{8}$ of an inch security in the lock. Daniel G. Olson, Schlage Lock Company representative, testified there was evidence of a "gouge" on the lock resulting in damage. The local police department was on the scene and in the course of the investigation noted there were fresh paint chips from the door and molding at the base of the lock and chips on the floor at the door entry to the room "that appeared to be of the same type of paint that was present on the door and door jamb and appeared to be relatively fresh." The police report recorded that "upon closer examination noted the door had recently been shimmed."

Additionally, on the night of the incident, travellers checks were reported stolen from Donna Kiefel's purse which was in the room when the assault occurred. These

checks were located by the police the following day and were determined to have been forged and cashed at a hotel several blocks from the Hacienda by an unknown person.

All of this information was before the jury through exhibits, depositions, and examination and cross-examination of the witnesses. There was adequate latitude allowed by the trial court for the defense to raise the questions of fact now placed before this court as well as the tactical interplay by defense counsel. The jury found the factual questions in favor of the plaintiff and there are adequate grounds for its so finding.

Hacienda also contends that the trial judge erred in refusing to admit its Exhibit No. 7 into evidence. Exhibit No. 7 consisted of one page of the nurses' notes which were notes made by the nurses attending Donna Kiefel during her hospitalization. The pertinent portion of Exhibit No. 7 are notes made by Nurse Sharon Hamlin of a statement made by Donna Kiefel at approximately 3:00 a. m. on March 4, 1962. The notes indicate that Donna Kiefel said she left "the door unlocked so that her husband could come in—."

We find no reversible error in excluding Exhibit No. 7. This exhibit was one page copied from Exhibit No. 10-A which consisted of all the pertinent hospital reports. Exhibit No. 10-A was admitted into evidence and Nurse Hamlin was examined on it at length. Thus, there was no omission of this important evidence as it was presented to the jury and presumably weighed in arriving at its verdict.

We perceive no error in the other objections raised by Hacienda.

The judgment on the verdict and the order taxing costs are hereby affirmed.

Affirmed.

3. THE JUDGMENT OF THE COURT OF APPEALS.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit,
Chicago, Illinois 60604.

Friday, November 15, 1968.

Before

Hon. John S. Hastings, Circuit Judge
Hon. Thomas E. Fairchild, Circuit Judge
Hon. Otto Kerner, Circuit Judge

DONNA M. KIEFEL,
Plaintiff-Appellee,
No. 15933 and 15976 (Consolidated)
vs.
LAS VEGAS HACIENDA, INC., a California corporation,
Defendant-Appellant,
REESE HUBBARD,
Respondent-Appellant.

DONNA M. KIEFEL,
Plaintiff-Appellee,
No. 16210
vs.
LAS VEGAS HACIENDA, INC.,
Defendant-Appellant.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.

This cause came on to be heard on the transcript of the record from United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the decisions, judgments and orders in this cause appealed from be, and the same are hereby AFFIRMED in part, REVERSED in part and REMANDED to the said District Court with directions, in accordance with the opinion of this Court filed this day.